No. 96-6298 (5)

Supreme Court, U.S.
FILED
FEB 27 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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10/4/95	DECISION AND ORDER: by Judge Rudolph T. Randa denying PETITION FOR WRIT OF HABEAS CORPUS
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5/21/96	MOTION by petitioner Aaron Lindh to SUPPLEMENT the Record on Appeal.
5/21/96	STIPULATION to Supplement the Record.
5/23/96	DECISION AND ORDER by Judge Rudolph T. Randa: IT IS HEREBY ORDERED THAT: The Clerk of Court shall supplement the appeal record as outlined in the stipulation filed May 21, 1996.
5/31/96	MOTION by petitioner Aaron Lindh to ADDITIONALLY SUPPLEMENT Record on Appeal.

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6/19/96 DECISION AND ORDER by Judge Rudolph T. Randa denying petitioner's motion to ADDITIONALLY SUPPLEMENT the record on appeal

10/10/96 MANDATE/CERTIFIED COPY from the USCA;

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 89-0896-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON J. LINDH,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT
FOR DANE COUNTY,
THE HONORABLE ROBERT R. PEKOWSKY, PRESIDING

BRIEF AND APPENDIX OF THE APPELLANT

• • •

STATEMENT OF FACTS[1]

Sometime during the lunch hour on January 15, 1988, Aaron Lindh walked into the ground floor of the City-County Building in Madison, Wisconsin. He was carrying a shotgun, shot three people that he did not know, and

---

[1] For the convenience of the court, a chronological listing of the facts which Appellant considers most significant is set forth in table form in the Appendix to this brief at p. 123.

then begged police officers to kill him. He almost got his wish.

Deputy Sheriff Louis Molnar ordered Lindh to stop and put down the shotgun, but Lindh continued to advance, pointing his weapon at the officer's head, indicating he intended to shoot and kill the officer unless he himself was shot and killed. Deputy Molnar repeated his demand to lay down the weapon two or three more times, but Lindh continued to advance shouting "Shoot me! Kill me!" Deputy Molnar fired two shots simultaneously with Lindh's discharge of his weapon (117:264). Lindh, who lay wounded on the floor, was immediately handcuffed and transported to Methodist Hospital (111:45; 117:227,265).

The three victims of this tragic rampage were Clyde "Bud" Chamberlain, Dane County Coroner, who was shot in his office on the ground floor of the City-County Building (117:183-198); Eleanor Townsend, a clerk-typist, who happened to come to the ground floor because she was taking papers from her fourth floor office to the Sheriff's Department (117:74, 110-101); and Eric Erickson, personnel officer from the Wisconsin Department of Justice, who was shot by Lindh after he came to the City-County Building during his lunch hour to pay a parking ticket (117:95-101). Coroner Chamberlain died on the floor of his office soon after he was shot (1:8). Eleanor Townsend was taken to Madison General Hospital, where she died from the gunshot wound at approximately 2:30 p.m. (1:7). Mr. Erickson, though seriously wounded, was taken to the Madison General Hospital emergency room, where he was treated and survived the shooting (1:6).

Later in the afternoon on the day of the shooting, Assistant District Attorney John Burr, who would later be lead counsel in the prosecution of Aaron Lindh, contacted and retained Doctor Leigh Roberts because Mr. Burr considered Dr. Roberts to be "one of the best forensic psychiatrists around" (115:45; 125:88). Dr. Roberts was alerted that there had been a shooting, that Mr. Lindh had been taken into custody, and that questions might be raised regarding his mental state during the shooting (111:13).

In the meantime, Aaron Lindh, who had been transported to Methodist Hospital, was placed under general anesthesia and underwent major surgery for 2 to 2-1/2 hours. The surgery ended at approximately 3:30 p.m., whereupon Lindh was sedated and taken to the intensive care unit, where he received further pain medication (111:34-37).

At 8:34 p.m. that same evening, Aaron Lindh was interrogated by two detectives from the Madison Police Department (111:48). At that time he was still confined in the intensive care unit (111:47), with two uniformed guards outside his room (111:54). The Madison detectives identified themselves, showed their badge and identification, and explained that they wanted to talk to him about the events in the City-County Building earlier that day. They gave Lindh a complete set of *Miranda* warnings, and questioned him for approximately 35 minutes (111:49-54). The Madison police detectives concluded their interview at 9:05 p.m., when Lindh said that he was thirsty and that he was starting to feel some pain (111:56).

At 9 p.m. that evening, the District Attorney's office contacted Dr. Leigh Roberts at his home and requested

that he visit Aaron Lindh at the intensive care unit of the Methodist Hospital (111:13). Dr. Roberts arrived at Lindh's bedside at 9:33 p.m. Lindh was confined by three leather restraints, looked tired and physically ill. He had a variety of hospital-type apparatus connected to him, including oxygen, a nasogastric tube, a catheter, a tube in his chest, and IV's in place. He gave Dr. Roberts the overall appearance of an ill person, someone who looked uncomfortable (111:14-15). Dr. Roberts explained to Lindh that Assistant District Attorney Burr had sent him; that any discussions were not confidential; and that anything reported could subsequently be reported to other persons since the interview was taking place "at the request of the District Attorney's office" (111:15).

Dr. Roberts explained that Lindh did not have to speak with him, he asked if Lindh had an attorney, and was informed that he did not (11:15). He asked if Lindh wanted an attorney before he spoke, and Lindh indicated that he did not. *Id.* Dr. Roberts asked Lindh if he understood that he was giving up his right to have an attorney before talking with him if he did talk with him, and Lindh indicated that he understood that (111:16). Dr. Roberts did not indicate that if Lindh couldn't afford to hire an attorney, one would be provided for him before any interview (111:17).

Dr. Roberts asked if Lindh was able to recall what had happened earlier in the day at the City-County Building. Lindh indicated that he limited [sic] amount of recall, but that he remembered shooting three people, two men and a woman. When Dr. Roberts asked why, Lindh responded that he didn't really know. Dr. Roberts asked Lindh whether he cared to discuss the details, and at that

point Lindh indicated he did not want to discuss the details at that time (111:17-18). At that point Dr. Roberts told Lindh that he might want to reconsider whether he wanted to talk with me at all, since he did not have a lawyer. Lindh did not respond, but closed his eyes.[2] Dr. Roberts then said, "Well, I'll wait a few minutes and come back and talk with you again." Dr. Roberts then left the room. This occurred at approximately 9:43 p.m., ten minutes after Dr. Roberts had arrived at Lindh's bedside (111:18).

Twelve minutes later, Dr. Roberts returned to Lindh's bedside. He prefaced further questioning of Lindh with an explanation of his purpose and of Lindh's rights, but this time, in a more cursory fashion:

> Again, I indicated to him, and went through, did he understand why I was there, did he understand he didn't have to talk to me. *We did not go through all of those matters.* But, again, he affirmed that he did have the understanding that he did not have to talk with me, that it wasn't confidential if he did talk. I mentioned,

---

[2] At trial, after an unsuccessful defense attempt to suppress statements based upon this assertion of the right to remain silence [sic], Dr. Roberts varied his testimony about these events. At trial, Dr. Roberts maintained that, immediately after he had asked Lindh whether he cared to discuss the details, Lindh closed his eyes and gave no affirmative response: "he then closed his eyes, *did not give an affirmation* to wanting to discuss those details." (125:24) (emphasis supplied) At trial, Dr. Roberts also volunteered during his narrative answer to another question that Lindh "had not really refused to talk with me . . . " (125:25).

again, his attorney, and his not having an attorney, and did he want one before we talked. And he indicated, then, he would talk with me.

(111:19) (emphasis supplied).

Dr. Roberts then asked Lindh a series of questions initially focusing on background information about his family and avoiding questions relating to the details of what had happened that afternoon. But Dr. Roberts soon returned to the details of the events at the City-County Building. Dr. Roberts elicited from Lindh the circumstances preceding the murders, Lindh's agitation about police handling of a robbery of his apartment, the details of the shooting, Lindh's current and recent mental state, the presence or absence of any suicidal feelings, significant depression, hallucination, voices or visions (111:19-21). Later, at trial, Dr. Roberts would suggest that this information taken from Lindh within hours of the shooting, gave to him a significant advantage over the other psychiatrists in diagnosing Lindh's mental state at the time of the shooting.

On February 26, 1988, Aaron Lindh was arraigned, and entered pleas of not guilty and not guilty by reason of mental disease or defect. At the request of the district attorney, the court appointed Drs. Roberts and Fosdal to examine the defendant on behalf of the state (20:1; 109:5,8).

From March 8, 1988, onward, Dr. Roberts became increasingly aware of serious allegations of misconduct on his part which could result in severe damage to his professional reputation, loss of his license, and Dane County felon charges. On that date, Dr. Roberts first

became aware that University of Wisconsin Hospitals were investigating an allegation that he had engaged in sexual misconduct with a female patient (69:1-2; 123:121-122; App. 112-113). Dr. Roberts also knew about the existence of sec. 940.22, Wis. Stats., which provides criminal penalties for the sexual exploitation of a patient or client by a therapist. He presumed that the prosecution of the statute would be in the same county where the events took place, so that any prosecution for violation of this statute arising out of the allegations made against him would be done in the Dane County District Attorney's office (123:124-125).

Sometime in May 1988, Dr. Roberts learned that the Medical Examining Board was also investigating charges of his sexual misconduct with a patient when the Examining Board made a request of him to provide them with records and there was reference to the complaint in the board's correspondence to Dr. Roberts (123:123-124).

On June 22, 1988, Dr. Roberts interviewed Aaron Lindh again, this time in the Dane County jail (125:89).

The very next day, on June 23, 1989 [sic], the investigation of Dr. Roberts' sexual misconduct was referred to the Dane County District Attorney's Office. The District Attorney immediately made efforts to refer the case to a special prosecutor because of a conflict of interest and a special prosecutor was formally appointed by the Dane County Circuit Court on Jun [sic] 29, 1989 [sic] (69:2; 123:125; App. 113). Dr. Roberts did not learn of the special prosecutor's appointment until July 8, 1988 (123:125).

On August 17, 1988, Dr. Roberts submitted a report concluding that Lindh was not suffering from a mental

disease or defect on January 15, 1988 (125:94). On August 22, 1988, he interviewed Lindh again (125:31).

On September 7, 1988, attorneys for Aaron Lindh filed with the Circuit Court and served upon the District Attorney a Specific Demand for Exculpatory Evidence. The demand was occasioned [sic] by the public revelation of disciplinary proceedings against Dr. Roberts before the Medical Examining Board. The complaint before the Medical Examining Board, which was by then a matter of public record (115:24), alleged numerous incidents of sexual misconduct by Dr. Roberts with three different female patients in treatment with him. This complaint was attached to the defense's specific demand for exculpatory evidence. The demand requested specific answers to eleven enumerated questions (68:1-9; App. 103-111). On September 9, 1988, Assistant District Attorney Burr responded by letter to the defense demand for exculpatory evidence. The prosecutor's response strenuously denied that any of the information sought could be characterized as exculpatory evidence, but did provide answers to the eleven questions posed by the defense (69:1-3; App. 112-114).

On September 12, 1988, the prosecution filed with the Circuit Court a motion *in limine* requesting that the trial court:

> . . . prohibit any inquiry by the defense of Dr. Leigh Roberts concerning any allegations made against Dr. Roberts by the State of Wisconsin Medical Examining Board, and more fully described in the Medical Examining Board complaint appended to the defense motion requesting "exculpatory evidence." The state further

> requests that the court order that there by [sic] no inquiry whatsoever concerning any ramification of those pending allegations, including, but not limited to, the status of Dr. Roberts' hospital privilege at University Hospitals.

(71:1; App. 115).

In arguing against the motion *in limine*, the defense noted that the circumstances raised serious questions relating to the bias, motive and interest of Dr. Roberts, who faced serious allegations of sexual misconduct with criminal implications, which Dr. Roberts knew could be decided and prosecuted by the Dane County District Attorney's office. Dr. Roberts continued his involvement with the Lindh case, and continued the process of arriving at his diagnosis. At the same time he was aware that the Dane County District Attorney, who had retained him in this case, would potentially be in a position to charge and prosecute him for sexual misconduct with patients (115:37-38). The defense also argued that aside from Dr. Roberts' bias, motive and interest, that he should be permitted to explore the ramifications of the pending allegations based on the serious ethical improprieties which had been alleged against Dr. Roberts by three separate women. The defense noted that if this trial were to follow the practice in prior prosecutions, while Dr. Roberts was being qualified as an expert, he would be presented to the jury as a professional of great integrity, impartiality, and ethics. Counsel noted that, in the past, Dr. Roberts had even informed juries that he was a deacon in his church (115:39). Defense counsel noted that University Hospitals had suspended Dr. Roberts' privilege to treat patients at that institution after conducting

their own investigation. He argued that he should be permitted, during his own questioning on Dr. Roberts' qualifications, to note this suspension so that the state would not be able to present Dr. Roberts as though he were "as pure as the driven snow" (115:40).

After repeatedly noting the Dane County District Attorney's "very careful handling" of a potentially difficult problem (115:47-48), the trial court ruled that evidence relating to the investigation of Dr. Roberts' misconduct was "totally irrelevant and immaterial" and granted the state's motion *in limine* (115:49). Defense counsel then queried the court to determine whether the scope of the trial court's ruling was a broad as the language in the state's motion:

> [DEFENSE COUNSEL]: Judge, does the court's opinion mean, literally, that there can't be any cross-examination of Dr. Roberts on any aspect, any ramifications of these allegations?
>
> THE COURT: That's correct.
>
> [DEFENSE COUNSEL]: The suspension at University Hospitals can't be delved into, in any [degree], in his credentials, in any voir dire examination?
>
> It's as if – am I correct in saying that what the court has ruled is its as if this allegation had never been made? All the potential ramifications arising from it are clearly off limits? And I can't – simply can't explore any aspect of this through a voir dire of Dr. Roberts on the stand?
>
> Judge, what I would be asking the court to do is to give me the right, outside the presence of the jury, to voir dire Dr. Roberts in more detail as to his knowledge of this matter, to explore in a little bit more detail possible biased interest and motive he had.
>
> THE COURT: So it's clear, the motion I granted is as asked. I was moved – this court was moved to prohibit any inquiry by the defense of Dr. Leigh Roberts concerning any allegations made against Dr. Roberts by the State of Wisconsin Medical Examining board, and more fully described in the Medical Examining Board complaint appended to the defense motion requiring exculpatory evidence.
>
> The state further requested – and I do grant, and this court does order – that there be no inquiry whatsoever concerning any ramifications of these pending investigations, including, but not limited to, the status of Dr. Roberts' hospital privileges at University Hospitals.
>
> I will, however, take under advisement your separate request for inquiry outside the presence of the jury, and I will want to think about that[3].
>
> But, at the moment, it's a blanket granting of the motion *in limine*.
>
> (115:50-51)

[3] Later, the trial court did permit live voir dire of Dr. Roberts outside the presence of the jury on the subject of the state's Motion *In Limine*. This voir dire disclosed no material variance between Dr. Roberts own responses and Prosecutor Burr's written answers to the defense's Specific Demand for Exculpatory Evidence, therefore, the trial court reaffirmed its ruling on the state' [sic] Motion In Limine (123:121-127; App. 117-122).

The principal witness for the defense at the mental responsibility phase of the trial was Dr. Ezra Griffith, an associate professor of psychiatry at the Yale University School of Medicine, who like the psychiatrists called by the state, was board certified in general psychiatry and also within the sub-specialty of forensic psychiatry (124:7-9). After explaining the basis for his diagnosis, Dr. Griffith testified to a reasonable degree of medical certainty that on January 15, 1988, Aaron Lindh was in a psychotic state which he diagnosed as "brief reactive psychosis"; that a result of that psychotic state Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct; and that as a result of that psychotic state Lindh lacked substantial capacity to conform his conduct to the requirements of law (124:72-74). Dr. Griffith also testified to a reasonable degree of medical certainty that Lindh had been suffering from mental diseases or disorders long before January 15, 1988. He characterized these long-term disorders as a "mixed personality disorder." He explained that by "mixed personality disorder" he meant that he had concluded to a reasonable degree of medical certainty that Aaron Lindh's long-term mental illness or disorder fit into two diagnostic categories: "borderline personality disorder" and "narcissistic personality disorder." These diagnoses were made to a reasonable degree of medical certainty (124:49-57). Dr. Griffith explained to the jury the relationship between his conclusion that Lindh had been afflicted with this mixed personality disorder long before the date of the crime, and his diagnosis and conclusion that on January 15, 1988, Lindh was in a psychotic state which denied him a substantial capacity to appreciate the

wrongfulness of his conduct, and to conform his conduct to the requirements of the law (125:78-81). Dr. Griffith also expressed his opinion that Aaron Lindh did not meet the criteria for "anti-social personality disorder" as outlined in DSM-III-R[4] (124:82-84).

The principal expert witness for the state was Dr. Leigh Roberts. while he was qualified, Dr. Roberts stressed his good character, high ethical standards and religious nature by noting that he was a grandfather with "eight grandchildren up to nearly the age of Mr. Lindh" (125:8); that not only was he a faculty member at the University of Wisconsin Medical School, but that he was also "on the adjunct faculty of the San Francisco Theological Seminary" (125:13); that he had chaired conferences "in relation to religion and mental health" (125:15); and that about three years prior to his testimony he had been "honored . . . as essentially the mid-west psychiatrist of the year" (125:16). Dr. Roberts disagreed with each and every professional opinion of Dr. Griffith. Dr. Roberts expressed his expert opinion that Aaron Lindh did not suffer from "borderline personality disorder" (125:72). He expressed an opinion that Lindh did not exhibit the traits of a "narcissistic personality disorder" (125:74-75). He expressed his opinion to a reasonable degree of medical certainty that Lindh could be characterized only as an "anti-social personality disorder"; and that Lindh was not

---

[4] The third revised edition of the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS frequently referred to during the trial by expert witnesses for both sides (124:47-48; 125:69, 76, 81).

suffering from a mental disease on January 15, 1988, at the time he committed the offenses (125:76).

Dr. Roberts claimed advantage over the other expert witnesses[5] in diagnosing Lindh's mental state on January 15, 1988, because only he had interviewed Lindh within hours of the crime:

> Q. In evaluating Mr. Lindh in the case materials regarding him, in your efforts to formulate your opinions, how important was it to you as a psychiatrist to see him on January 15, 1988, the day of the shooting?
>
> A. It's very important. It's not always essential. It is possible to reconstruct what happened. It's possible a person has memory of that period of time, and as there is other information about an individual, other persons who saw them and described them during that time, it's possible to do that reconstruction and to do it in a very accurate and knowledgeable kind of way.
>
> However, it is very helpful to have had the first hand experience and to be able to do a professional evaluation that close in time to the actual event and to see what he looked like in that immediate period, that particular day within

---

[5] Dr. Fosdal, the state's other expert witness, did not see Lindh until April 15, 1988, three months after the shooting (125:140). In cross-examining Dr. Griffith, the defense expert, the prosecutor took care to point out that he had not interviewed Lindh until July, six months after the shooting:

> Q And it's a fact, sir, that you did not see Mr. Lindh until July 9th, 10th, and 11th?
>
> A That's correct.

(124:89)

> just a few hours of the time that their behavior occurred.
>
> It would be even more helpful to have seen him 30 minutes later, but a few hours later does give one a much better professional indication. One has to, when they don't have that opportunity, to then rely upon the report of the individual, a report of their experience, and the report of other persons who have seen them at that time, what they look like, how they appear to feel, what they're saying, what they're doing to place a lot of reliance on the behavior of a person, so very helpful but not absolutely essential.

(125:85-86).

The state also called Dr. Frederick Fosdal as an expert witness. Dr. Fosdal testified that he had talked to Aaron Lindh on two occasions for three hours each time (125:140). In examining Dr. Fosdal, the district attorney did not ask about those interviews in the same detail as had been asked of Dr. Roberts, nor was other information providing the basis for Dr. Fosdal's diagnosis elicited in the same detail given by Dr. Roberts. Instead the prosecutor elected to shorten Dr. Fosdal's presentation by relying upon the fact that this witness was present in court when Drs. Griffith and Roberts had testified (125:141) Dr. Fosdal testified that he "would assume" that he had the same materials available to him as did the other doctors who had diagnosed Lindh (125:141). Without describing the substance of his interviews of Lindh, Dr. Fosdal testified that the information he had obtained from those interviews was "for all intents and purposes identical to what Drs. Griffith and Roberts [had] testified to" and "similar

in format and [sic] that had already been testified to." (125:141-142)

On that basis, Dr. Fosdal expressed his opinion that Lindh was not suffering from a "brief reactive psychosis" on the day of the crime (125:156-157), and that Lindh did not have a mental disease at that time (125:163), but unlike Dr. Roberts, he agreed with Dr. Griffith that Aaron Lindh fit the category of "mixed personality disorder" (125:166). He conceded to the defense that in the "mixed personality disorder" which he himself had diagnosed, Lindh "might have" the traits of both "narcissistic personality disorder" and "borderline personality disorder" which had been found by Dr. Griffith (125:166-167).

After deliberation, the jury found that Aaron Lindh was not suffering from a mental disease at the time of the murders in the City-County Building on January 15, 1988 (126:81). Further facts will be stated as necessary in the argument, which follows.

* * *

STATE OF WISCONSIN	CIRCUIT COURT BRANCH V	DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

AARON J. LINDH,

Defendant.

SPECIFIC DEMAND FOR EXCULPATORY EVIDENCE

Case No. 88-CF-60

Now comes the Defendant, AARON J. LINDH, by his attorneys, ROBERT P. BURKE and ANN DAVEY, and respectfully makes the following specific demand for exculpatory evidence on the grounds that such evidence goes to the credibility of state witness Dr. Leigh Roberts and may form the foundation for impeachment on the grounds of bias or motive and further such evidence may be relevant on the general qualifications of the witness as an expert psychiatric witness. Attached is a copy of the notice and complaint which was filed against Dr. Roberts.

1. When was Dr. Roberts first aware that any of the allegations had been made?

2. When was he first aware that the allegations could result in criminal charges against him?

3. When were any of the allegations first referred to the Dane County District Attorney's Office, either formally or informally?

4. When was Dr. Roberts first aware that any of the allegations had been referred to the Dane County District Attorney's Office.

5. Was Dr. Roberts ever contacted by either the Dane County District Attorney's Office or any police officer concerning these allegations? If so, when and what was discussed?

6. How long did the allegations remain pending in the Dane County District Attorney's Office before being referred to a special prosecutor?

7. When was the special prosecutor appointed?

8. Was Dr. Roberts aware of this appointment? If so, how was he notified and when?

9. Has any member of the Dane county District Attorney's Office been in contact with an attorney representing Dr. Roberts concerning these allegations? If so, when were these contacts made and what was the substance of the conversation?

10. Had the Dane County District Attorney's Office made any formal or informal decision as to whether criminal charges should be filed against Dr. Roberts prior to the appointment of the special prosecutor? If so, was Dr. Roberts or his representative made aware of this decision?

11. Is the Dane County District Attorney's Office aware of any additional allegations of misconduct against Dr. Roberts in his professional capacity which are not set forth in the attached complaint? If so, what are these allegations?

Dated this 7th day of September, 1988.

RESPECTFULLY SUBMITTED:

/s/ Robert P. Burke
ROBERT P. BURKE
Assistant State Public Defender

/s/ Ann Davey
ANN DAVEY
Assistant State Public Defender

Attorneys for Defendant

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(608) 266-9158
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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	COMPLAINT LS8808291MED
LEIGH M. ROBERTS, M.D., RESPONDENT	:	

Pamela E. Ellefson, an investigator with the Wisconsin Department of Regulation and Licensing, Division of Enforcement, 1400 E. Washington Avenue, Madison, Wisconsin 53702, upon information and belief, complains and alleges as follows:

COUNT I

1. Leigh M. Roberts, M.D., Respondent herein, is duly licensed and registered to practice medicine and surgery in the state of Wisconsin pursuant to license number 0011745, which was granted January 21, 194. That Respondent's last address reported to the Department of Regulation and Licensing, as required by section 440.11, Wis. Stats., is 600 Highland Avenue, Madison, Wisconsin 53792.

2. That Respondent specializes in the area of psychiatry, and so specialized at all times relevant to this complaint.

3. That in April of 1981 Patient 1 was referred by her pastoral counselor to Respondent for psychiatric evaluation and possible therapy. That Respondent first saw Patient 1, in Respondent's professional capacity, on 4/22/81.

4. When Respondent saw Patient 1 on 4/22/81, he diagnosed her as suffering from a bi-polar affective disorder and prescribed Lithium for that disorder. Respondent also noted that Patient 1 had a mixed personality disorder.

5. Patient 1 saw Respondent, in his professional capacity, in his office through January, 1983 and again on September 30, 1983.

6. That in May of 1982, Respondent gave Patient 1 a hug at the conclusion of a Saturday therapy session. At the next appointment, Patient 1 gave Respondent a hug and Respondent pressed Patient 1 close, leaned toward her to kiss her on her mouth, and when she indicated by her posture she did not want a kiss he kissed her on her neck.

7. That from the time of the hugs in May of 1982 through January of 1983 the hugging continued in a similar manner. On one occasion Respondent hugged Patient 1 very tightly, moved her back and forth across his chest in a sensual manner, grasped her by her buttocks and pulled her forward against Respondent's groin.

8. That following an appointment on January 25, 1983, Patient 1 did not see Respondent again until an appointment of September 30, 1983. A few days previous to September 30, 1983, Patient 1 telephoned Respondent

concerning her Lithium blood levels. Respondent ordered a Lithium blood test done at the hospital where he practices and Patient 1 had the test done.

9. That Patient 1 met with Respondent, at his office, on September 30, 1983 to discuss the results of the blood test, among other things. At that appointment, Respondent kissed and hugged Patient 1 and touched her breasts through her clothing.

10. That following the 9/30/83 session, Patient 1 continued to meet with Respondent at his office on regular occasions through February of 1984. On those occasions they engaged in sexual contact, including sexual intercourse.

11. In February of 1984, Patient 1 advised Respondent that she could not continue with their relationship and she stopped seeing him for all purposes. In May of 1984, Respondent called Patient 1 concerning a mutual acquaintance and also told Patient 1 that he wanted to see her. Patient 1 met with Respondent at his office on June 5, 21, 26, and September 8, 1984. Respondent and Patient 1 engaged in sexual contact on all four occasions, and sexual intercourse on the first three occasions. Respondent and Patient 1 also met at Respondent's office on March 25, 1986 and had sexual intercourse. Patient 1 returned to Respondent's office on April 15, 1986 at which time there was romantic kissing but no other sexual contact.

12. That it is below the level of minimal competence for a psychiatrist to enter into a sexual relationship with a patient, who is in therapy with that psychiatrist, and to continue such a sexual relationship.

13. That a psychiatrist who enters into a sexual relationship with a patient, who is in therapy with their psychiatrist, exposes that patient to risks of harm to which a minimally competent psychiatrist would not expose a patient.

14. That Respondent be engaging in the conduct set out in this Count of this Complaint has engaged in conduct which tends to constitute a danger to the health, welfare or safety of Patient 1, which constitutes unprofessional conduct as defined by section 448.02(3), Wis. Stats., and Wis. Adm. Code section Med 10.02(2)(h).

COUNT II

15. Realleges paragraphs 1 and 2 of this complaint.

16. That Respondent first saw Patient 2, in Respondent's professional capacity, on September 4, 1981 and continued to treat her in his professional capacity through February 4, 1983.

17. That Respondent initially saw Patient 2 for headaches and depression. That at the time therapy with Respondent ceased in February of 1983, Respondent diagnosed Patient 2 as suffering from a bipolar disorder with depression and headaches, with a prominent extracranial vascular component.

18. That during that period of therapy Respondent provided Patient 2 with psychotherapy and medication. Respondent saw Patient 2 on a regular basis.

19. That during the period of therapy Patient 2 told Respondent that she had been sexually abused between the ages of six and eights. [sic]

20. That at the February 4, 1983 Saturday session in Respondent's office Respondent produced some lotion and advised Patient 2 that Respondent wanted to rub Patient 2's back, an act which would have required Patient 2 to remove her top. That Patient 2 declined to allow Respondent to give her a back rub. That during the session Respondent put his arms around Patient 2, kissed Patient 2 with an open-mouth kiss, touched her sexually without her permission, and told her that he wanted to make love to her.

21. That Patient 2 immediately left Respondent's office and never returned.

22. That it is below the level of minimal competence for a psychiatrist to attempt to enter into a sexual relationship with a patient, who is in therapy with that psychiatrist.

23. That a psychiatrist who attempts to enter into a sexual relationship, with a patient who is in therapy with that psychiatrist, exposes that patient to risks of harm to which a minimally competent psychiatrist would not expose a patient.

24. That Respondent by engaging in the conduct set out in this Count of this Complaint has engaged in conduct which tends to constitute a danger to the health, welfare or safety of Patient 2, which constitutes unprofessional conduct as defined by section 448.02(3), Wis. Stats., and Wis. Adm. Code section Med 10.02(2)(h).

COUNT III

25. Realleges paragraphs 1 and 2 of this Complaint.

26. That Patient 3 saw Respondent in Respondent's professional capacity from June 20, 1983 through February, 1988. That Patient 3 first went to Respondent because of depression.

27. That Respondent diagnosed Patient 3 as suffering from a bipolar affective disorder and treated her with psychotherapy and medications.

28. After Patient 3 had been seeing Respondent for therapy for a few months, Patient 3 asked if she could hug Respondent, which he allowed. Over several sessions, the hugs escalated to kisses, Respondent touching Patient 3's breasts, and then sexual intercourse.

29. Patient 3 and Respondent continued to have sexual intercourse and other sexual contact at therapy sessions held at Respondent's office through November of 1987.

30. That on two occasions prior to November, 1987 Respondent went to Patient 3's home to provide her with psychotherapy and had sexual contact and sexual intercourse with Patient 3.

31. Respondent and Patient 3 continued to have sexual contact, but not sexual intercourse at Respondent's office through the last session, which was held in February of 1988.

32. That Patient 3 came to the realization that what was occurring with Respondent was improper, and she terminated therapy with Respondent in February, 1988.

33. That it is below the level of minimal competence for a psychiatrist to enter into a sexual relationship with a patient, who is in therapy with that psychiatrist, and to continue such a sexual relationship.

34. That a psychiatrist who enters into a sexual relationship with a patient, who is in therapy with that psychiatrist, exposes that patient to risks of harm to which a minimally competent psychiatrist would not expose a patient.

35. That Respondent by engaging in the conduct set out in this Count of this complaint has engaged in conduct which tends to constitute a danger to the health, welfare or safety of Patient 3, which constitutes unprofessional conduct as defined by section 448.02(3), Wis. Stats., and Wis. Adm. Code section Med 10.02(2)(h).

Wherefore, the Complainant demands that the Board hear evidence relevant to matters recited herein, determine, and impose the discipline warranted. Complainant further demands that the Board assess against the Respondent all costs of the proceeding and order them paid to the Department of Regulation and Licensing, pursuant to sec. 440.22, Wis. Stats.

/s/ Pamela E. Ellefson
Pamela E. Ellefson,
Investigator

STATE OF WISCONSIN)
)
COUNTY OF DANE)

Pamela E. Ellefson, being first duly sworn on oath deposes and says that she is an investigator for the State

of Wisconsin, Department of Regulation and Licensing, Division of Enforcement, and that she has read the foregoing Complaint and knows the contents thereof and that the same is true to her own knowledge, except as to those matters therein stated on the information and belief and as to such matters, she believes them to be true.

/s/ Pamela E. Ellefson
Pamela E. Ellefson
State of Wisconsin
Department of Regulation
& Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Subscribed and sworn to before me
this 25th day of August, 1988.

/s/ John B. Zwieg
John B. Zwieg, Notary Public
My Commission is permanent

John R. Zwieg
Attorney for Complainant
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
(608) 266-9932

JRZ:gad
DOEATTY-293

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	NOTICE OF HEARING
LEIGH M. ROBERTS, M.D.,	:	LS8808291MED
RESPONDENT.	:	

TO: Leigh Roberts, M.D.
B6 240
Clinical Science Center
600 Highland Avenue
Madison, WI 53792

Please take notice that a hearing constituting a class 2 proceeding as defined in sec. 227.01(3)(b), Wis. Stats., will be held on the 28th, 29th and 30th days of November, and 1st and 2nd days of December, 1988 at 9:30 a.m. or as soon thereafter as the matter may be reached, in Room 133, 1400 East Washington Avenue, Madison, Wisconsin, on the questions of whether the license heretofore, issued to the above-named respondent pursuant to section 448.02, Wis. Stats., should be suspended or revoked, the above-named respondent should be reprimanded or whether such license should be limited.

The legal authority and jurisdiction under which the hearing is to be held is set forth in section 448.02(3), Wis. Stats., and Chapter RL 2, and Chapter MED 12, Wis. Adm. Code.

The matters asserted and the charges then and there to be considered are as set forth in the attached complaint to which you are required, pursuant to sec. RL 2.09, Wis. Adm. Code, to make answer in writing within twenty (20) days from the date of service of the complaint. The hearing examiner designated to preside over the matter pursuant to sec. 227.46, Wis. Stats. and sec. RL 2.10, Wis. Adm. Code, is James E. Polewski, Department of Regulation and Licensing, Office of Hearing Examiner, P.O. Box 8935, Madison, Wisconsin 53708-8935. You shall file your answer with the examiner at the address indicated, a copy of said answer with the Board and a copy with complainant's attorney, John R. Zwieg, Department of Regulation and Licensing, Division of Enforcement, P.O. Box 8935, Madison, Wisconsin 53708-8935 (608) 266-9932. If you fail to file an answer within such time, a default judgment may be entered, and your license revoked, suspended, or other disciplinary action taken upon proof of such default. If you fail to appear at the time set for hearing, a default judgment may be entered, and your license revoked, suspended, or other disciplinary action taken upon such default.

If you are represented by counsel, the counsel is requested to file a notice of appearance with the Board forthwith.

Dated at Madison, Wisconsin this 26th day of August, 1988.

/s/ John R. Zwieg
John R. Zwieg, Attorney
Division of Enforcement

JRZ:skv
TENDAY-1263

[SEAL]

DANE COUNTY
DISTRICT ATTORNEY'S OFFICE

HAL HARLOWE
DISTRICT ATTORNEY

(Letterhead Omitted In Printing)

September 9, 1988

Attorney Robert Burke
State Public Defender's Office
131 West Wilson Street, 7th Floor
P.O. Box 7862
Madison, Wisconsin 53707

Re: *State of Wisconsin vs. Aaron J. Lindh*
Case No. 88 CF 60

Dear Mr. Burke:

Please find enclosed a final copy of an autopsy protocol prepared by Dr. Huntington concerning his autopsy of Eleanor Townsend. We just received the final copy yesterday. You earlier received a rough copy of that autopsy.

I spoke with Dr. Leigh Roberts today. You have already received the notes of his initial interview with Lindh. I should be able to get into personal contact with Dr. Roberts over the weekend and get copies of notes of his other interviews with your client. We will get those to you on Monday.

On September 7, 1988, you filed a motion entitled "Specific Demand for Exculpatory Evidence." The information sought in the eleven questions in that "Specific Demand" is not and has never been, in our view, exculpatory evidence. We unequivocally believe that under no interpretation is this evidence exculpatory.

Nonetheless, since you have requested information concerning this case and in the past, when possible, we have always provided it, I have the following response.

1. Dr. Roberts became aware of an allegation made to University Hospitals on March 8, 1988.

2. On March 8, 1988.

3. On Thursday, June 23, 1988, at approximately 12:30 p.m., District Attorney Hal Harlowe met with counsel for University Hospitals. A request for this meeting was made by hospital attorneys on the morning of June 23, 1988.

4. Dr. Roberts first became aware that allegations had been referred to the Dane County District Attorney's Office between July 6 and July 8, 1988.

5. Dr. Roberts was never contacted by any member or representative of the Dane County District Attorney's Office nor was he contacted by any police officer concerning these allegations.

6. In the meeting of June 23, 1988, District Attorney Harlowe advised attorneys from the hospital that because our office had worked closely with Dr. Roberts on a number of past and pending cases that in his view a conflict of interest existed and we were ethically required to request appointment of special counsel to investigate the allegations and take whatever further action might be appropriate. On June 23 and 24, 1988, District Attorney Harlowe

attempted, without success, to reach Milwaukee County District Attorney Michael McCann to determine if he would accept appointment as special counsel. Several phone messages were exchanged and District Attorney Harlowe finally spoke with District Attorney McCann on June 27, 1988. District Attorney McCann advised District Attorney Harlowe that they had no conflict of interest and would accept the appointment.

7. On June 28, 1988, District Attorney Harlowe submitted the attached motion to Chief Judge Angela Bartell who signed the order appointing E. Michael McCann special prosecutor. On June 29, 1988, a copy of this order was mailed to District Attorney McCann. No one from the Dane County District Attorney's Office has had contact with the case or discussed it with District Attorney McCann's office since.

8. Dr. Roberts was aware of the appointment of a special prosecutor between July 6 and July 8, 1988. He was notified of this appointment by his attorney, John D. Hanson.

9. To my knowledge I am the only member of the Dane County District Attorney's Office who has had contact with Dr. Roberts' attorney, John D. Hanson. I phoned him on the morning that the article concerning Dr. Roberts appeared in the "Wisconsin State Journal" and only inquired as to how Dr. Roberts was doing.

Subsequently, on September 7, 1988, over the noon hour, Mr. Hanson called me to inform me that he had been contacted by you or one of your representatives on the previous day. I then asked him the questions posed in your demand and received some responses.

10. No formal or informal decision was made by the Dane County District Attorney's Office as to whether criminal charges should be filed against Dr. Roberts prior to the appointment of a special prosecutor. I am unaware as to whether this lack of any decision was communicated to Dr. Roberts or his attorney.

The Dane County District Attorney's Office is not aware of any additional allegations of misconduct against Dr. Roberts in his professional capacity.

Insofar as I am able, I have responded to your request for information.

Sincerely,

/s/ John R. Burr
John R. Burr
Assistant District Attorney

JRB:djd

cc: Judge Robert R. Pekowsky

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 5	DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

AARON J. LINDH,

Defendant(s).

MOTION IN LIMINE

Case No. 88 CF 60

NOW COMES the State of Wisconsin, by Assistant District Attorneys John Burr and Jac Heitz, hereby moves the Court to prohibit any inquiry by the defense of Dr. Leigh Roberts concerning any allegations made against Dr. Roberts by the State of Wisconsin Medical Examining Board and more fully described in the Medical Examining Board complaint appended to defense motion requesting "exculpatory evidence." The State further request that the Court order that there be no inquiry whatsoever concerning any ramification of those pending allegations, including but not limited to the status of Dr. Roberts' hospital privilege at University Hospitals.

Said inquiry would be totally irrelevant to the proceedings in the above-captioned case and not admissibile [sic] under any section of Chapter 904 of the Wisconsin Statutes nor admissible under Chapter 906 or Chapter 907, Wis. Stats. In short, the State of Wisconsin believes that any such inquiry be totally irrelevant and immaterial to the issues presented to the Court.

Dated at Madison, Wisconsin, this 12 day of September, 1988.

Respectfully submitted:

/s/ John R. Burr
John Burr
Assistant District Attorney
Dane County, Wisconsin

/s/ Jac Heitz
Jac Heitz
Assistant District Attorney
Dane County, Wisconsin

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[117] LEIGH ROBERTS

called as a witness, having been first duly sworn, was examined and testified as follows:

VOIR DIRE EXAMINATION BY MR. BURKE:

Q Sir, your name is Dr. Roberts?

A That's correct.

Q Okay. Doctor, your first involvement in this case was January 15th, the evening of January 15th of 1988?

A I had a phone contact in the late afternoon. My first contact with Mr. Lindh was that evening.

Q Doctor, when you began your involvement in this case on January 15th, at that point were you aware of any allegations of misconduct that were going to be lodged against you or threatened to be lodged against you at that time?

A No, I was not.

Q At some point you were aware there was a hospital investigation concerning the allegations of misconduct?

A Yes.

Q When were you first aware of the hospital investigation?

A March 8th of this year.

Q Doctor, how did you become aware of that hospital investigation?

[118] A I was informed by the hospital's attorney.

Q Were you aware at that point – I'm not asking for the details, but were you aware of what type of allegation of misconduct it was?

A Yes.

Q At that point, was it – were you aware of more than one individual who was making the allegation?

A No.

Q Just the one?

A Yes.

Q Were you aware at that point that the allegation against you could have or could be the subject of a criminal prosecution under Wisconsin Statutes?

A Yes, I was aware of the Statute.

Q That was 940.22?

A The number I wouldn't know.

Q But you were aware that at least the allegation against you could have – could be a criminal prosecution subjecting yourself up to a five year prison sentence?

A I was not aware of that detail.

Q Doctor, the complaint that was eventually filed against you in front of the Medical Examining Board concerning the three allegations was March 8th, the first time you were aware of any of these allegations that there was a complaint lodged against you? Is my question unclear?

[119] MR. BURR: I must confess, I'm confused by it.

THE COURT: Do you want that reworded, doctor?

THE WITNESS: It appeared to involve two different matters, and I was – I find it difficult to respond to.

BY MR. BURKE:

Q Okay. Doctor, you're aware of the complaint that has been lodged against you that's now pending in front of the Medical Examining Board?

A Yes.

Q When were you first aware of any of those allegations, that they were either going to be made or there was, in your mind, an awareness that they were going to be made?

A I'm – I'm having difficulty in terms of we appear to be taking about two different – two different matters and I'm having difficulty in the crossing of those two.

Q Doctor, you indicated on March, I believe, 8th that you were aware of the hospital investigation?

A That's correct.

Q Were you aware before March 8th at any point that there were allegations of sexual misconduct that were going to be filed against you before March 8th?

A No.

Q So, even informally or indirectly, you weren't aware that there were some potential allegations that might be coming down against you?

[120] A No.

Q Doctor, when were you first aware of the investigation by the Medical Examining Board?

A I can't give a precise date. It would have been – I believe it was in May.

Q Doctor, do you know how you became aware?

A Yes, a request was made to provide records and there was indication in correspondence that there had been a complaint made.

Q Doctor, apparently there was a meeting involving Mr. Harlowe on June 23rd with some officers from the hospital, I'm assuming concerning allegations against you. Were you aware that there was going to be a meeting?

A The first awareness I had of that was in seeing some correspondence this afternoon.

Q Doctor, when you were first aware of this allegation back on March 8th, would I be correct in saying that you were also aware that the criminal – there was a potential for a criminal charge that could have ended up in the Dane County District Attorney's Office?

A I guess I – I should have had that awareness. I really did not give that thought, as such. I simply knew that there was a statute related to that. I would presume the prosecution of such a statute would be in the same [121] county, so it would, therefore, be in the District Attorney's Office.

Q Doctor, when were you first aware that the matter concerning the allegations, the subject of the Medical Examining investigation, when were you first aware that

those allegations were referred to the District Attorney's Office here in Dane County?

A About about [sic] the 8th of July; it was early July.

Q Do you know how you became aware of that?

A Yes. I was informed of that by a private attorney.

Q Somebody that you retained?

A Yes.

Q When were you first aware that the matter was – there was appointment of a special prosecutor?

A I believe that had been done as of that time.

Q Doctor, have you or an attorney in your behalf ever discussed these allegations, the allegations of sexual misconduct, with anyone in the Dane County District Attorney's Office?

A Well, I have not. I can't – I'm not sure I can speak fully for someone else. To my knowledge, I don't know that he has, but I can't speak for him.

Q You don't know if he did so prior to July 8th when you were first aware of the referral to the Dane County District Attorney's Office?

[122] A I don't know other than his having been informed, you know, the details of that. I don't know.

Q Okay. I have no further questions.

VOIR DIRE EXAMINATION BY MR. BURR:

Q Just so it's clear, doctor, you – as I understand it, you became apprised that the allegations had been

referred to our office on or about July 8th and you learned that through your attorney?

A That's correct.

Q And at the same time you learned that there had been appointment of a special prosecutor?

A Yes.

Q Did these allegations and what you've described here today have any effect whatsoever on your involvement in this case?

A No.

Q No further questions.

THE COURT: Mr. Burke?

MR. BURKE: Nothing further.

THE COURT: Thank you, doctor. I appreciate your being available for this examination. Any reason why the doctor should be detained?

MR. BURR: I need to speak with him briefly on scheduling.

THE COURT: I'll see you tomorrow morning.

* * *

IN THE UNTIED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, Warden,

Respondent.

Case No. 92-C-0690

(Filed Sep. 11, 1992)

MOTION TO REQUIRE STATE TO FILE TRANSCRIPTS AND REQUEST FOR BRIEFING SCHEDULE

Petitioner, by undersigned counsel, moves pursuant to Rule 5 of the Federal Rules governing cases in the United States District Courts under sec. 2254 of Title 28, U.S. Code, for an order requiring the state to file with the court copies of the transcripts of the relevant state trial court proceedings in this matter. Petitioner also asks that the court establish a briefing schedule in this case. In support of this motion, petitioner states the following:

1. The respondent answers the petition for writ of habeas corpus by denying that petitioner's constitutional right to confront the state's witnesses was violated when the trial court restricted his cross-examination of the state's key psychiatric witness at the mental responsibility phase of his trial. The respondent also alleges that if petitioner's constitutional rights were violated, the error was harmless. Resolution of these issues will require the court to consider the transcripts of the trial proceedings. For this reason, petitioner believes that the

respondent should file with the court at least the transcripts of the hearing on motions on May 23, 1988, and the trial proceedings on September 13, 1988, September 14, 1988, September 15, 1988, September 16, 1988, September 17, 1988, September 19, 1988, September 20, 1988, September 21, 1988, September 22, 1988, September 23, 1988, and September 24, 1988.

2. Respondent also alleges for the first time in this case that petitioner's constitutional rights were not violated because the constitutional right to confront one's accusers does not apply at the mental responsibility/ insanity phase of a bifurcated proceeding in Wisconsin. Petitioner concedes that if the court rules solely on this issue, review of the transcripts may not be necessary. Petitioner denies, however, that the confrontation clause is inapplicable at the second phase of a bifurcated proceeding. Petitioner assumes that briefing on that issue would best be presented in conjunction with briefing on the substantive issue of whether petitioner's confrontation clause rights were violated under the circumstances of this case. Therefore, petitioner believes that submission of the transcripts at this time is necessary.

WHEREFORE, petitioner requests that the court direct the respondent to submit the transcripts from the trial court proceedings in this matter on May 23, 1988, September 13, 1988, September 14, 1988, September 15, 1988, September 16, 1988, September 17, 1988, September 19, 1988, September 20, 1988, September 21, 1988, September 22, 1988, September 23, 1988, and September 24, 1988, and that the court establish a briefing schedule.

Dated the 10th day of September, 1992.

Respectfully submitted,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State Public Defender
Post Office Box 7862
Madison, Wisconsin 53707
(608) 267-5176

Attorney for Petitioner.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, Warden,

Respondent.

Case No. 92-C-0690

(Filed Sep. 16, 1992)

RESPONSE TO MOTION TO COMPEL STATE TO FILE TRANSCRIPTS

Respondent, by his undersigned attorneys, hereby opposes the motion requesting the court to compel the state to file transcripts in this case, for the following reasons:

1. Petitioner concedes that if respondent is correct that he has no federal constitutional right to confrontation at the insanity phase of trial, his claim is not cognizable on federal habeas and that transcripts of the trial and pretrial proceedings would not be necessary. In order to avoid the unnecessary time and expense of copying voluminous transcripts, respondent suggests that this court should accept briefs on this issue first, since it might be dispositive.

2. In the alternative, if transcripts are ordered, respondent suggests that petitioner should be required to

file a copy of the relevant transcripts with the court. Although the rules appear to contemplate that respondent ordinarily is responsible for filing the transcripts, that rule is evidently premised on the assumption that a habeas petitioner is pro se and has no access to the transcripts. Here, however, petitioner is represented by counsel, the same counsel who was appointed by the state public defender's office to represent him in the state courts. Pursuant to state statute, petitioner was entitled to and presumably received a complete copy of the relevant transcripts, at state expense, when he initiated his state appeal. Respondent believes it is unduly burdensome to require respondent to supply the transcripts in this situation, where petitioner has at least as much access and ability to provide them as respondent. The practice in habeas cases to require the respondent to provide the transcripts is contrary to the ordinary practice where the moving party is responsible for presenting the record to the court. This unique procedure should be reserved for only those cases where it is necessary – i.e., in pro se cases where the petitioner has no access to the information.

Dated this 15th day of September, 1992.

JAMES E. DOYLE
Attorney General

/s/ Sally L. Wellman
SALLY L. WELLMAN
Assistant Attorney General

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1677

(SEAL)

THE STATE OF WISCONSIN
STATE PUBLIC DEFENDER

APPELLATE DIVISION

131 West Wilson Street, 7th Floor, P.O. Box 7862
Madison, Wisconsin 53707
(608) 266-3440

State Public Defender
Nicholas L. Chiarkas

Chief, Trial Division
Ellen K. Berz

Deputy State Public Defender
Eileen A. Hirsch

Chief, Appellate Division
Kenneth P. Casey

September 22, 1992

The Honorable John W. Reynolds
Senior Judge, United States District Court
Eastern District of Wisconsin
Federal Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Aaron Lindh v. James P. Murphy
Case No. 92-C-0690

Dear Judge Reynolds:

The respondent has answered my motion to compel production of the transcripts in this habeas corpus case by arguing that the transcripts are unnecessary if the court will first address the question of whether the confrontation clause applies at the insanity phase of a bifurcated trial in Wisconsin, and by arguing that if the transcripts are required, that the petitioner, rather than respondent, should be compelled to submit them.

I have no strong objection to the court separating the issues and addressing first the question of whether the confrontation clause applies at the insanity phase of the bifurcated proceeding. If, however, the court should decide to proceed in that manner, it seems to me that it might be appropriate for the court to set a briefing schedule under which the respondent must file his brief first. I suggest this because the issue the respondent wishes to have briefed is one that the respondent raises for the first time in these proceedings. At no time during the state court proceedings did the state argue that the confrontation clause is inapplicable at the insanity/mental responsibility phase. Because the issue is being raised for the first time now, I do not have a good sense for what the state's argument on this point is. Without seeing the state's argument first, it will be difficult for me to construct a legal argument responding to the new contention.

I also want to respond to the state's request that when transcripts are ordered, the court order that petitioner, rather than respondent, submit them. Respondent asks this court to order that which the governing rules do not permit. Rule 5 of the Rules Governing Proceedings in 18 U.S.C. sec. 2254 cases explicitly requires the respondent, not the petitioner, to provide the transcripts. The advisory committee note to the rules confirms that it is respondent's obligation to provide the transcripts. Respondent provides no authority for his proposition that this rule can be ignored or that this rule only applies in cases where the petitioner proceeds pro se.

If the court would like to discuss these issues, I am certainly amenable to a telephone conference call to work

out the procedures that will be followed in this case. Thank you for your consideration of these matters.

Very truly yours,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

cc: Ms. Sally L. Wellman
Assistant Attorney General
123 West Washington Avenue
Post Office Box 7857
Madison, WI 53707

cc: Mr. Sofron Nedilsky
Clerk, U.S. District Court
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, WI 53202

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner-Appellant,

v.

JAMES P. MURPHY,

Respondent-Appellee.

District Court Case No. 92-C-690
Court of Appeals No. 95-3608

MOTION TO SUPPLEMENT THE RECORD

Pursuant to Fed. R. App. P. 10(e) and Seventh Circuit Rule 10(b), and the attached stipulation of the parties, the petitioner-appellant Aaron Lindh moves the court to issue an order directing that a supplemental record be certified and transmitted to the United States Court of Appeals for the Seventh Circuit, containing the documents specified in the attached stipulation, copies of which are also attached to the stipulation. Each of these documents was issued by or submitted to the court as a part of the record and proceedings in the district court in this case. None of these documents was included in the original record transmitted to the court of appeals in this appeal; each is still present in the district court's file (the copies of the letters were made from the originals found in the court's file).

The court of appeals has now ordered that this case be heard en banc and has directed the parties to submit supplemental briefs by May 31, 1996, on a new issue: the applicability and effect of § 104 of the Antiterrorism and

Effective Death Penalty Act of 1996, Pub. L. 104-132. Petitioner-Appellant Aaron Lindh submits that each of these documents has now become material to his briefing and argument on this new issue and that the documents are properly made a part of the record on appeal.

Dated this 16th day of May, 1996.

Respectfully submitted,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State Public Defender

Office of the State Public Defender
Post Office Box 7862
Madison, Wisconsin 53707
(608) 267-5176

Attorney for Petitioner-Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner-Appellant,

v.

JAMES P. MURPHY,

Respondent-Appellee.

District Court Case
No. 92-C-690
Court of Appeals
No. 95-3608

STIPULATION TO SUPPLEMENT THE RECORD

Pursuant to Fed. R. App. P. 10(e) and Seventh Circuit Rule 10(b), the parties to this action hereby stipulate that the following documents, copies of which are attached hereto, were issued by or submitted to the district court as a part of the record and proceedings in the district court in this case, and are properly made a part of the record on appeal and shall be included in a supplemental record submitted to the court of appeals:

- The DECISION AND ORDER entered July 24, 1992, by the Honorable John W. Reynolds, granting the petitioner's petition to proceed in forma pauperis, and ordering that the respondent respond to the petition for a writ of habeas corpus within 30 days.

- The letter dated September 22, 1992, from Keith A. Findley to the Honorable John W. Reynolds.

- The letter dated January 22, 1993, from Keith A. Findley to the Honorable Rudolph T. Randa.

- The letter dated August 18, 1993, and stamped received August 20, 1993, from Keith A. Findley to the Honorable Rudolph T. Randa.

- The letter dated March 2, 1994, and stamped received March 3, 1994, from Keith A. Findley to the Honorable Rudolph T. Randa.

- The letter dated March 29, 1995 and stamped received April 3, 1995, from Keith A. Findley to the Honorable Rudolph T. Randa.

/s/ Sally L. Wellman 5/16/96
SALLY L. WELLMAN Date
Assistant Attorney General
State of Wisconsin

Counsel for Respondent-Appellee

/s/ Keith A. Findley 5/16/96
KEITH A. FINDLEY Date
Assistant State Public Defender
State of Wisconsin

Counsel for Petitioner-Appellant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

Case No. 92-C-690

-vs-

95-3608

JAMES P. MURPHY,

Respondent.

DECISION AND ORDER

Before the Court is petitioner's motion to supplement the appeal record. The respondent stipulates to this motion.

NOW THEREFORE BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

The Clerk of Court shall supplement the appeal record as outlined in the stipulation filed May 21, 1996.

Dated at Milwaukee, Wisconsin, this 23rd day of May, 1996.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U. S. District Judge

ORIGINAL FOR COURT FILE
COPY RETAINED FOR JUDGE'S FILE

Copy mailed to Attorneys for parties by the court pursuant to rule 77(D) Federal rules of civil procedures, 10-20-92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

Civil Action No. 92-C-690

v.

JAMES P. MURPHY, Warden,

Respondent.

ORDER

(Filed Oct. 20, 1992)

IT IS ORDERED that the above-captioned action is TRANSFERRED to Judge Rudolph T. Randa.

Dated at Milwaukee, Wisconsin, this 20th day of October, 1992.

BY THE COURT

/s/ John W. Reynolds
John W. Reynolds
Senior Judge

(SEAL)

THE STATE OF WISCONSIN
STATE PUBLIC DEFENDER

131 West Wilson Street Room 750 53703 3333,
P.O. Box 7862 (53707-7862)
Madison, Wisconsin
(608) 266-3440

State Public Defender Nicholas L. Chiarkas
Chief, Trial Division Ellen K. Berz

Deputy State Public Defender Eileen A. Hirsch
Chief, Appellate Division Kenneth P. Casey

January 22, 1993

The Honorable Rudolph T. Randa
United States District Court
Eastern District of Wisconsin
Federal Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Aaron Lindh v. James P. Murphy
Civil Action No. 92-C-0690

Dear Judge Randa:

On October 20, 1992, I received notice that the Honorable John W. Reynolds had transferred the above referenced case to you. At the time of the transfer, I had pending before the court a motion seeking an order compelling the respondent to file the transcripts in this habeas action. The respondent answered that motion and I replied with a letter suggesting various alternatives for ordering submission of the transcripts and for establishing a briefing schedule. Additional copies of all of these documents are enclosed for your convenience.

Because the briefing schedule, the sequence in which the parties are to submit their briefs, and the issues to be addressed in the initial briefs, are dependent on the court's rulings on the various issues raised in the pending motion and responses by the respondent and petitioner, nothing further has happened on this case since those documents were filed and since the case was transferred to you. I wish to alert you to the fact that these matters are pending and require your resolution so that this case can proceed. If you would find it helpful, I would be happy to participate in a telephone conference call to discuss these procedural issues. Thank you for your attention to this matter.

Respectfully yours,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

KAF:crs

Enclosures

cc: Sally L. Wellman
Assistant Attorney General
Post Office Box 7857
Madison, WI 53707
(without enclosures)

Mr. Sofron Nedilsky
Clerk, U.S. District Court
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, WI 53202
(without enclosures)

(SEAL)

THE STATE OF WISCONSIN
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APPELLATE DIVISION
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State Public Defender
Nicholas L. Chiarkas

Chief, Trial Division
Ellen K. Berz

Deputy State Public Defender
Eileen A. Hirsch

Chief, Appellate Division
Kenneth P. Casey

August 18, 1993

Hon. Rudolph T. Randa
United States District Court
Eastern District of Wisconsin
Federal Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 53202

Re: Aaron Lindh v. James P. Murphy
Civil Action No. 92-C-0690

Dear Judge Randa:

Almost one year ago, on or about September 10, 1992, I filed a motion on behalf of the petitioner in this habeas action requesting the court to require the state to file the transcripts of the petitioner's state criminal trial and requesting the court to set a briefing schedule. The respondent answered that motion, and I replied with a letter suggesting various alternatives for ordering submission of the transcripts and for establishing a briefing schedule.

On October 20, 1992, I received notice that the Honorable John W. Reynolds had transferred this case to you. When I did not hear anything further from the court after that, I wrote to you on January 22, 1993, explaining that this case was awaiting a decision on the motion to compel filing of the transcripts and the request for briefing schedule, and advising you that the case could not progress any further until these matters were resolved.

Because I have not heard anything from the court in the seven months since that letter, I again am writing to request that the court address that motion. Because the briefing schedule, the sequence in which the parties are to submit their briefs, and the issues to be addressed in the initial briefs are dependent on the court's rulings on the various issues raised in the pending motion and responses, nothing further has happened or can happen on this case until those issues are resolved. I respectfully request that the court address the issues presenting pending before this court so that this case may proceed. If you would find it helpful, I will be happy to participate in a telephone conference call to discuss these procedural issues. Thank you for your attention to this matter.

Respectfully yours,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

KAF:pgd

cc: Ms. Sally L. Wellman
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mr. Sofron Nedilsky
Clerk of Court
362 Federal Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 53202

(SEAL)

THE STATE OF WISCONSIN
STATE PUBLIC DEFENDER

APPELLATE DIVISION

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Madison, Wisconsin
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State Public Defender Nicholas L. Chiarkas

Director, Appellate Division Kenneth P. Casey

Deputy State Public Defender Eileen A. Hirsch

March 2, 1994]

Hon. Rudolph T. Randa
United States District Court
Eastern District of Wisconsin
362 Federal Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 53202

Re: *Aaron Lindh v. James P. Murphy*
Civil Action No. 92-C-0690

Dear Judge Randa:

I am writing once again to ask the court to resolve the preliminary procedural motions pending in the above-referenced case so that this action may proceed. On or about September 10, 1992, I filed a motion on behalf of the petitioner requesting the court to require the state to file the transcripts of the petitioner's state criminal trial and requesting the court to set a briefing schedule. The respondent answered that motion, and I replied with a

letter suggesting various alternatives for ordering submission of the transcripts and for establishing a briefing schedule.

On January 22, 1993, I wrote the court to remind it that these procedural matters were pending and to request that the court address these matters. I wrote the court again on August 18, 1993. Because I still have not heard anything from the court in approximately one and one-half years, I am writing again to ask that some action be taken on this matter.

Sincerely,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

KAF:pgd

cc: Ms. Sally L. Wellman
Assistant Attorney General

cc: Mr. Sofron Nedilsky
Clerk of Court
Eastern District of Wisconsin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

Case No. 92-C-690

-vs-

JAMES P. MURPHY, Warden,

Respondent.

ORDER

(Filed Mar. 4, 1994)

Petitioner has filed a "Petition For Writ of Habeas Corpus" and in connection requests that this Court compel the State to file transcripts from the proceedings which are the subject of this petition.

The respondent, through Assistant Attorney General Sally Wellman, opposes the petition and the motion to compel the State to file the transcripts. Respondent argues that the filing of transcripts *at this time* is unnecessary because the petitioner has no cognizable claim under federal habeas proceedings. More specifically, respondent argues that petitioner has no federal constitutional right to confrontation at the insanity phase of his state trial. Respondent suggests that the Court decided this issue first.

Because the petitioner has no strong objection to the Court proceeding in this manner the Court will decide

the aforesaid issue first and orders that briefs be submitted in the following manner.

> Respondent shall file a brief within 35 days from the date of this Order.
>
> Petitioner shall file a response brief within 70 days from the date of this Order.
>
> Respondent shall have 15 days after petitioner's filing to submit a rebuttal brief.[1]

Dated at Milwaukee, Wisconsin, this 4th day of March, 1994.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U. S. District Judge

[1] The Court reserves ruling on the issue as to which party bears the responsibilty for filing transcripts.

(SEAL)

THE STATE OF WISCONSIN
STATE PUBLIC DEFENDER

APPELLATE DIVISION

17 South Fairchild Street, 3rd Floor (53703-3204)
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State Public Defender Nicholas L. Chiarkas

Director, Appellate Division Virginia A. Pomeroy

Deputy State Public Defender Eileen A. Hirsch

March 29, 1995

Hon. Rudolph T. Randa
United States District Court
Eastern District of Wisconsin
362 Federal Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 53202

Re: *Aaron Lindh v. James P. Murphy*
Civil Action No. 92-C-0690

Dear Judge Randa:

Almost a year ago, in May 1994, the parties completed briefing a preliminary issue in this case regarding the applicability of the confrontation clause at the insanity phase of a bifurcated trial in Wisconsin. The case has been ready for a decision from the court on that issue since then.

I am writing at this time simply to remind the court that this matter is pending and ready for decision. In

addition, since the briefing, I have discovered additional authority supporting the petitioner's position that the confrontation clause applies at dispositional-type proceedings, like the insanity phase of a bifurcated trial. In *Huebner v. State*, 33 Wis. 2d 505, 526, 527, 147 N.W.2d 646 (1967), the Wisconsin Supreme Court held that a commitment procedure for sex offenders, invoked in lieu of sentencing, although certainly dispositional in nature, is different than ordinary penal sentencing. The court held that the full panoply of due process rights, including confrontation rights, applies in such a proceeding. The court cited *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir. 1966), in support of this holding. These cases make clear that the confrontation clause applies at a separate commitment proceeding that follows a finding of guilt in a criminal case. Thank you for your consideration.

Sincerely,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

KAF:pgd

cc: Ms. Sally L. Wellman
Assistant Attorney General

cc: Mr. Sofron B. Nedilsky
Clerk of U.S. Dist. Court of Eastern Dist.
of Wisconsin

---

156 Wis.2d 768

STATE of Wisconsin,
Plaintiff-Respondent,*

v.

Aaron LINDH, Defendant-Appellant.

No. 89-0896-CR.

Court of Appeals of Wisconsin.

Submitted on Briefs Dec. 8, 1989.

Opinion Released May 24, 1990.

Opinion Filed May 24, 1990.

Defendant was convicted of murder. Judgment was entered in the Circuit Court, Dane County, Robert R. Pekowsky, J. Defendant appealed. The Court of Appeals, Gartzke, P.J., held that: (1) psychiatrist interviewing suspect shortly after incident did not improperly advise him of his rights to remain silent, and (2) trial court committed prejudicial error by refusing to permit defendant to cross-examine psychiatrist as to charges that he had sexually abused his patients.

Reversed and remanded.

Before GARTZKE, P.J., and SUNDBY and DYKMAN, JJ.

GARTZKE, Presiding Judge.

Aaron Lindh appeals from a judgment of conviction of two counts of first-degree murder, sec. 940.01(1), Stats.

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*Petition for Review granted.

1985, while using a dangerous weapon, sec. 939.63(1)(a)2, Stats., of attempted first-degree murder while using a dangerous weapon, sec. 939.32(1)(a), and of carrying a firearm in a public building, sec. 941.235(1), Stats.

On January 15, 1988, Lindh carried a shotgun into the City-County Building in Madison, Wisconsin, and shot three people he did not know. When deputy sheriff Louis Molnar ordered Lindh to stop and put down his weapon, Lindh advanced on him while shouting "Shoot me! Kill me!" Lindh and Molnar simultaneously fired at each other. Lindh was hit and disabled. Molnar was not hit. Two of Lindh's three victims died.

Lindh pled not guilty by reason of mental disease[1] to all charges. A bifurcated trial was held pursuant to sec. 971.165, Stats. He pled guilty to the firearm charge and the dangerous weapon penalty enhancer and was found guilty of the other charges by a jury. The jury then found

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[1] Section 971.15, Stats., provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

(2) As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

Lindh did not have a mental disease at the time of the shootings. Lindh challenges only that finding.

Lindh contends that the trial court erred by refusing to suppress statements he made to a psychiatrist. We conclude that the court did not err in that regard. Lindh also contends that he should have been allowed to cross-examine the psychiatrist about pending investigations into his sexual misconduct with patients. We agree, and because the error was prejudicial, we reverse the judgment and remand for a new trial as to Lindh's mental state.

1. FACTS

Lindh was taken to the hospital after deputy Molnar shot him, was placed under general anesthesia, and underwent surgery which ended at 3:30 p.m. Lindh was then sedated, placed in intensive care, and given pain medication.

During the afternoon, the prosecutor assigned to the case retained Dr. Leigh Roberts, a psychiatrist with a specialty in forensic psychiatry. The prosecutor told Dr. Roberts that a shooting had occurred, that Lindh was in custody, and that questions might be raised regarding his mental state during the shooting. The prosecutor asked Dr. Roberts to interview Lindh.

At 8:34 p.m., two Madison detectives questioned Lindh in intensive care. They questioned him for thirty minutes after first identifying themselves and warning him in accordance with *Miranda v. Arizona*, 384 U.S. 436,

86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[2] They concluded the interview when Lindh said he was thirsty and was starting to feel some pain.

At 9:33 p.m., Dr. Roberts came to Lindh's hospital room. At the suppression hearing, Dr. Roberts testified as follows:

> Q: When you first contacted [Lindh], what did you tell him, if anything?
>
> A: When I first contacted him, I introduced myself. I explained that you [the prosecutor] had sent me. I explained the purpose of the examination, related to my determining his mental state as of that time and as of earlier that day. As I went through each of the items with him, I asked him if he understood and got a verbal affirmative response from him. I explained to him that our discussion was not of a confidential nature, that anything that was reported could subsequently be reported to other persons, since it was done at the request of the District Attorney's office and it related to legal matters. I explained to him that he did not have to speak with me. I asked him if he had an attorney. He indicated, "No." I asked him if he wanted an attorney before he spoke with me. And, again, he indicated, "No." I asked him if he understood that he was giving up his right to have an attorney before talking with me, if he did talk with me. And he indicated he did. I explained to him that the concerns about his mental state had to do with was he at risk to harm himself.
>
> . . . .
>
> I explained to him, also, that the purpose of the examination had to do with his mental abilities now, in terms of talking with people, and my assessment of his mental abilities that afternnoon, and that that might be used later in a court process, concerning was he mentally responsible.
>
> . . . .
>
> Q: Did you indicate to him, sir, that if he couldn't afford to hire an attorney, one would be provided for him, before you talked to him?
>
> A: No. I did not. Dr. Roberts did not tell Lindh that he could stop the questioning at any time.

Dr. Roberts asked Lindh if he could recall what had happened earlier that day in the City-County Building. Lindh said he had a limited amount of recall but remembered shooting three people. When asked why, Lindh responded that he did not know and that he did not want

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[2] One of the detectives read Lindh his rights from a card which said: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have a lawyer present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed at county expense to represent you before any questioning, if you so wish. You can decide at any time to exercise these rights and not answer any questions or make any statements." The detective asked Lindh after each sentence whether he understood it. Lindh each time stated that he did. When asked whether he was willing to talk with those rights in mind, Lindh responded, "Sure."

to discuss the details at that time. Dr. Roberts then suggested that Lindh might want to reconsider whether to talk at all because he did not have a lawyer. Lindh responded by closing his eyes. Dr. Roberts stated that he would leave, wait a few minutes, and then return.

Dr. Roberts left Lindh and returned twelve minutes later. Lindh said he understood that he did not have to talk with Dr. Roberts and understood why Dr. Roberts was there. Dr. Roberts then mentioned the absence of a lawyer but Lindh said he would talk. Dr. Roberts asked Lindh about his background, what had led to the shooting incident, and his past and present mental state. This second meeting lasted for about thirty minutes.

On March 8, 1988, Dr. Roberts learned that the University of Wisconsin hospital was investigating a claim that he had engaged in sexual misconduct with a female patient. He knew of sec. 940.22, Stats., which provides criminal penalties for the sexual exploitation of a patient by a therapist. In May 1988, he learned that the Medical Examining Board was investigating charges against him. The complaint before the board alleged several incidents of sexual misconduct by Dr. Roberts with three female patients.

On April 8, 1988, Lindh moved to suppress his statements to the police and Dr. Roberts because they were obtained in violation of *Miranda*. The trial court denied the motion by decision and order filed September 15, 1988.

Meanwhile, on June 22, 1988, Dr. Roberts again interviewed Lindh in the Dane county jail. The next day, the hospital referred the investigation of Dr. Roberts' sexual

misconduct to the Dane county district attorney. The district attorney immediately sought to have a special prosecutor appointed. The circuit court made the appointment on June 28, 1988. Dr. Roberts learned of the appointment on July 8, 1988. On August 17, 1988, he issued a report concluding that Lindh did not suffer from a mental disease on the day of the shooting. On August 22, 1988, he again interviewed Lindh.

The state moved the trial court in limine to prohibit any inquiry at trial about the allegations of sexual misconduct against Dr. Roberts or any possible ramifications of the allegations. The court granted the motion.

At the mental disease stage of the trial, Dr. Ezra Griffith testified on behalf of Lindh. Dr. Griffith is a specialist in forensic psychiatry and an associate professor of psychiatry at Yale University. He opined that at the time of the shooting Lindh suffered from a mental disease. He was in the throes of a psychotic state diagnosed as a brief reactive psychosis. As a result of that state, Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

Dr. Griffith also testified that long before the shooting Lindh had suffered from mental disorders. Dr. Griffith characterized Lindh's long-term disorder as a mixed personality disorder which fit into two diagnostic categories: borderline personality disorder and narcissistic personality disorder. He then described the relationship between the long-term disorders and Lindh's psychotic state at the time of the shooting. He testified

that brief reactive psychoses are known complications of each personality disorder.

Dr. Roberts was the state's principal witness. While being qualified in the presence of the jury as an expert witness, Dr. Roberts noted that he had "eight grandchildren up to nearly the age of Mr. Lindh," that he was a faculty member of the University of Wisconsin Medical School, an adjunct faculty member of the San Francisco Theological Seminary, and on the board of trustees of North Central College, that he had served on various committees dealing with mental retardation, rehabilitation, and the sex crimes law, that he had chaired conferences on mental health in relation to religion, rehabilitation, and law, and that he had recently been honored "as essentially the mid-west psychiatrist of the year." He had testified "several hundred times" on the mental condition of persons who have committed crimes.

Dr. Roberts opined that Lindh was not suffering from a mental disease at the time of the shooting. He had an antisocial personality disorder but that is not a mental disease. He had neither a borderline nor a narcissistic personality disorder. He did not suffer a brief reactive psychosis.

Dr. Roberts implied he had an advantage in diagnosing Lindh's mental state because he had interviewed Lindh within hours of the crime. When asked how important it was to see Lindh on the day of the shooting, Dr. Roberts testified:

> It's very important. It's not always essential. . . . However, it is very helpful to have had the first hand experience and to be able to do a professional evaluation that close in time to the actual event and to see what he looked like in that immediate period, that particular day within just a few hours of the time that [the] behavior occurred. . . .

The state also called Dr. Frederick Fosdal, a psychiatrist, as an expert witness. Dr. Fosdal was present during the testimony of the other two doctors and had available to him most of the same materials they relied upon. He testified that he had twice talked with Lindh for three hours and the information he obtained during those interviews was identical to that the other doctors obtained.

Dr. Fosdal opined that Lindh was not suffering a brief reactive psychosis on the day of the shootings. Lindh had no mental disease on that day. He agreed with Dr. Griffith that Lindh fit the category of mixed personality disorder. He conceded that Lindh might have the traits of both a narcissistic personality disorder and a borderline personality disorder. He agreed that brief reactive psychoses are possible complications of each disorder and that a brief reactive psychosis is a mental disease.

The jury found that Lindh was not suffering from a mental disease at the time of the shootings in the City-County Building on January 15, 1988. The trial court entered the judgment of conviction from which Lindh appeals.

2. VIOLATION OF MIRANDA RIGHTS

The prosecution stipulated that Dr. Roberts acted as an agent of the police when he initially questioned Lindh after his surgery. As a police agent, Dr. Roberts was required to give *Miranda* warnings.

Lindh argues that Dr. Roberts gave him insufficient *Miranda* warnings when interviewing him on the day of the shooting. Lindh notes that Dr. Roberts failed to advise him that he had the rights to have counsel appointed for him if he could not afford counsel and to cut off questioning at any time. He also argues that Dr. Roberts failed to scrupulously honor Lindh's invocation of his right to remain silent.

The state denies that Lindh's *Miranda* rights were violated. It argues in the alternative that the privilege against self-incrimination does not apply to the mental disease phase of a bifurcated trial. We conclude that Lindh's *Miranda* rights were not violated. We therefore do not reach the state's alternative argument.

That Dr. Roberts gave Lindh incomplete *Miranda* warnings is undisputed. However, Lindh admits that a detective had given him a complete set of warnings an hour before Dr. Roberts arrived. Lindh ended his conversation with the detectives by stating that he was thirsty and feeling some pain, not by invoking his right to remain silent or his right to an attorney. When Dr. Roberts arrived, he explained to Lindh that he had the right not to talk and asked Lindh if he wanted counsel before questioning.

Given the complete *Miranda* warnings to Lindh an hour earlier, we conclude that Dr. Roberts gave him "the now familiar *Miranda* warnings . . . or their equivalent." *California v. Prysock*, 453 U.S. 355, 360, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981) (emphasis in original) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 297, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 [1980]). "It would be strange indeed for [a] court to hold that, where within the space of a few hours a defendant has been properly advised of his rights, a subsequent confession would be vitiated by an admonition that was somewhat less than technically perfect." *Grennier v. State*, 70 Wis.2d 204, 213, 234 N.W.2d 316, 321 (1975). Here only an hour intervened between Lindh's being properly advised and the less than complete admonitions.

Lindh argues that he invoked his right to remain silent by telling Dr. Roberts that he did not want to discuss the details of the shootings and by closing his eyes when Dr. Roberts said he might want to reconsider whether to have an attorney present. We disagree.

Lindh did not invoke his right to remain silent but rather expressed initial reluctance to discuss a topic. *People v. Galimanis*, 765 P.2d 644, 647 (Colo.Ct.App.1988), *cert. granted*, 783 P.2d 838 (Colo.1989). Dr. Roberts gave Lindh a few minutes to reconsider whether he wanted to talk at all and whether he wanted an attorney. Lindh acquiesced by closing his eyes. He at no time stated he did not wish to talk or that he wanted an attorney. When Dr. Roberts returned, Lindh agreed to talk, answered background questions, and then freely discussed details of the shootings. As in Galimanis, "[t]here is nothing in the record to show that his comments were coerced or involuntary in

any way, or that his responses were the result of surreptitious mental invasion." *Id.* (citing *Early v. Tinsley,* 286 F.2d 1 [10th Cir.1960], *cert. denied,* 365 U.S. 830, 81 S.Ct. 717, 5 L.Ed.2d 708 [1961]).

Having concluded that Lindh's *Miranda* rights were not violated, we need not and do not decide whether statements taken in violation of *Miranda* must be suppressed in the mental disease phase of a bifurcated trial.

3. IMPEACHMENT OF PSYCHIATRIST

Lindh argues here, as he forcefully argued to the trial court, that he should have been allowed to cross-examine Dr. Roberts about the pending investigations concerning his alleged sexual misconduct with patients. Lindh avers that the error prejudiced him and violated the confrontation clause of the sixth amendment to the United States Constitution. We conclude prejudicial error occurred and do not reach the constitutional question.

The trial court precluded Lindh's cross-examining Dr. Roberts regarding the investigations on grounds that the matter was irrelevant to the sanity issues and did not support Lindh's theory that Dr. Roberts was biased. We will sustain the exclusion of evidence on relevancy grounds unless the trial court abused its discretion. *Rogers v. State,* 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980). "The proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." *Id.* In Wisconsin, any relevant

matter may be inquired into on cross-examination without regard to the scope of direct examination. *Id.*

Lindh contends that the evidence of the pending investigation was relevant to Dr. Roberts' truthfulness. He asserts that the evidence tended to show bias because Dr. Roberts faced possible criminal charges and might want to curry favor with the prosecutor and affected his credibility as a supposedly "impartial professional who is just rendering an objective opinion." The state responds that any connection between the pending investigations and Dr. Roberts' professional opinion on Lindh's mental state is far-fetched. The criminal investigation had been referred by the Dane county district attorney to a special prosecutor. No criminal charges had been brought against Dr. Roberts. No deal had been struck.

However, in this case, as in Rogers, the credibility of the witness whose impeachment was disallowed was an unusually important factor. *Rogers,* 93 Wis.2d at 691, 287 N.W.2d at 778. Although Dr. Roberts was not the state's only expert witness, he implied that he was situated advantageously because he was the only psychiatrist who saw Lindh on the day of the shootings. He disputed each contention of Lindh's expert. And his profession and livelihood could be jeopardized if he were convicted of sexual misconduct with a patient.[3]

> A trial court should be particularly solicitous of cross-examination intended to disclose bias or

---

[3] A "therapist" (which includes a physician) "who intentionally has sexual contact with a patient . . . during any ongoing therapist-patient . . . relationship" is guilty of a class D felony. Sec. 940.22(2), Stats.

> prejudice; e.g., a broad opportunity for examination should be allowed if its objective is to establish that an adverse witness in a criminal matter is giving his testimony in anticipation of favorable personal treatment, such as, police leniency by the state. . . .
>
> . . . The mere possibility of future criminal charges is a sufficient basis to explore the motives of the witness on cross-examination [and to] place his apprehensions thereof before the jury.

State v. Chesnut, 621 P.2d 1228, 1233 (Utah 1980), disapproved on other grounds, *State v. Crick*, 675 P.2d 527, 531 (Utah 1983).

While the record discloses no direct evidence that any state authority threatened or promised anything to Dr. Roberts, the jury could have reasonably inferred that a witness in the position of Dr. Roberts would perceive that he would benefit if he testified against Lindh or that he would suffer retaliation if he testified in favor of Lindh. The jury could consider those inferences strengthened by the circumstances of Lindh's crime.[4] Whether or not the trial judge or the judges of the court of appeals would draw those same inferences is not the question. We leave such matters to juries if the inferences are reasonable.

We conclude the trial court abused its discretion by not permitting cross-examination of Dr. Roberts regarding the pending investigations of sexual misconduct. The

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[4] Lindh killed two county employees and attempted to kill an employee of the state's justice department.

jurors were entitled to know the facts from which they could reasonably infer possible bias on the part of the state's most important witness in the mental disease phase of Lindh's trial. They should have heard evidence useful to them "in appraising the credibility of the witness and evaluating the probative value of the direct testimony." *Rogers*, 93 Wis.2d at 689, 287 N.W.2d at 777.

The error prejudiced Lindh. If the jury had disbelieved Dr. Roberts, they could have relied upon the other expert for the state, Dr. Fosdal. His testimony was significantly more guarded than Dr. Roberts'. Dr. Fosdal agreed with Dr. Griffith that Lindh fit the category of mixed personality disorder and conceded Lindh might have the traits of narcissistic and borderline personality disorders. Dr. Fosdal conceded that brief reactive psychoses are known complications of the latter two disorders. If the jury had been given reason to doubt Dr. Roberts' diagnoses, it could have concluded Lindh had suffered a brief reactive psychosis and therefore a mental disease.

A reasonable possibility exists that the error contributed to the jury's finding that Lindh did not suffer from a mental disease at the time of the shootings. That being the case, we cannot find that the error was harmless. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

We conclude the second phase of the bifurcated proceeding must be retried. We do not reach the issue whether the error deprived Lindh of his rights under the confrontation clause of the sixth amendment. *See Id.* at 533, 370 N.W.2d at 227 (appellate court need not address

claim of constitutional error if relief available on statutory or common law grounds).

Judgment reversed and cause remanded for a new trial as to whether Lindh is not guilty of the charges by reason of mental disease or defect.

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161 Wis.2d 324

STATE of Wisconsin,
Plaintiff-Respondent-Petitioner,

v.

Aaron LINDH, Defendant-Appellant.

No. 89-0896-CR.

Supreme Court of Wisconsin.

Argued Jan. 25, 1991.

Decided April 17, 1991.

STEINMETZ, Justice.

The principal issue in this case is whether the trial court abused its discretion by ruling in favor of the state's *in limine* motion to restrict defense impeachment of one of the state's psychiatric witnesses during the mental capacity phase of the bifurcated trial.

A second issue is whether the trial court abused its discretion during the mental capacity phase of the trial by refusing to suppress the use of statements taken from the defendant by a psychiatric witness within hours of the defendant's arrest.

With respect to the first issue, the court of appeals reversed the circuit court for Dane county, Judge Robert R. Pekowsky, holding that the trial court's order restricting defense impeachment of the state's psychiatric witness was an abuse of discretion and remanding the case for a new mental capacity phase of the trial. With respect to the second issue, the court of appeals affirmed the trial

court's decision allowing the introduction of the defendant's statements.[1]

We reverse the court of appeals and hold that the trial court did not abuse its discretion in granting the state's motion *in limine*. We affirm that portion of the court of appeals decision which held that the trial court did not err by refusing to suppress the use of the statements challenged by the defense.

* * *

The issues relate only to "phase II," the mental capacity phase of a bifurcated trial, pursuant to sec. 971.165, Stats. At phase I, the guilt phase of the trial, the defendant, Aaron Lindh, was charged with the following offenses: two counts of first-degree murder, contrary to sec. 940.01, Stats.; one count of attempted first-degree murder, contrary to secs. 939.32(1)(a) and 940.01; committing the acts alleged above while using a dangerous weapon, contrary to sec. 939.63(1)(a)2; and one count of carrying a firearm in a public building, contrary to sec. 941.235(1). Lindh pleaded guilty to the firearm and dangerous weapon charges and was found guilty of the other charges by a jury. At phase II of the trial, Lindh, pursuant to sec. 971.15,[2] claimed he had a mental disease at the

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[1] *State v. Lindh*, 156 Wis.2d 768, 457 N.W.2d 564 (Ct.App.1990).

[2] Section 971.15, Stats., provides as follows:

> **Mental Responsibility of defendant.** (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

time of the crimes and so pleaded not guilty for that reason. The jury found that Lindh did not have a mental disease at the time of the crimes. Accordingly, a judgment of conviction was entered against Lindh on all charges.

The charges arose out of an incident occurring during the noon hour of January 15, 1988. Lindh was in the City-County Building in Madison, Wisconsin, to meet with officers of the Madison Police Department.[3] After talking with certain police officers, Lindh apparently left the building and went to his automobile parked nearby, in which he had a modified .22-caliber rifle. Lindh then reentered the building and proceeded to walk into an office of the Dane County Sheriff's Department, hiding the rifle under the coat he was wearing. There, he summarily shot and killed Eleanor Townsend, a sheriff's department secretary, adn [sic] then shot and seriously injured Erik Erikson, a private citizen who was present for the purpose of paying a parking ticket. He then proceeded to the county coroner's office, where he shot and killed Clyde

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> (2) As used in this chapter, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> (3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

[3] The meeting evidently was either for the purpose of discussing the department's progress concerning its investigation of two burglaries of Lindh's apartment that had occurred during the previous week or for the purpose of discussing the imminent disposition of a charge Lindh was facing.

Chamberlain, the coroner. He then brandished the gun at a deputy sheriff, advanced on the officer and challenged the officer to shoot and kill him. Lindh was shot, disabled and transported to Madison Meriter Hospital where he underwent surgery. After surgery, Lindh was taken to the hospital's intensive care unit where he remained through the evening.

Late in the afternoon of the shootings, Dane County Assistant District Attorney John Burr retained Dr. Leigh Roberts, whom Burr considered "one of the best forensic psychiatrists around." Dr. Roberts was informed of the shootings. He was told that Lindh had been taken into custody, that questions might be raised regarding Lindh's mental state during the shootings, and that he might be requested to interview Lindh in this connection.

That evening, shortly after 8:30 p.m., two detectives from the Madison Police Department visited Lindh in the intensive care unit. They identified themselves to Lindh as police officers and indicated that they wanted to talk with him about the shootings in the City-County Building earlier that day. The detectives fully advised Lindh of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)[4], which rights he waived. The detectives questioned Lindh for approximately 35 minutes.

At 9:00 p.m. that evening, the district attorney's office contacted Dr. Roberts at his home and requested that he interview Lindh that same evening. Dr. Roberts

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[4] *See State v. Hernandez*, 61 Wis.2d 253, 257, 212 N.W.2d 118 (1973), in which these rights are set forth and discussed.

agreed to do so and arrived at Lindh's bedside at 9:33 p.m. He explained to Lindh that Assistant District Attorney Burr had sent him and indicated that the interview was taking place "at the request of the District Attorney's office." Before beginning his interview of Lindh, Dr. Roberts essentially reiterated to him all of his *Miranda* rights, except that he did not inform him that before any interview an attorney would be provided to him at county expense if he wanted and could not afford one. Dr. Roberts also informed Lindh that the purpose of his interview related to assessing Lindh's mental state at the time of the shootings. Lindh did nothing to suggest that he was not disposed to such an interview.

Dr. Roberts began to question Lindh, asking him if he could recall what happened earlier that day in the City-County Building. Lindh said he had a limited amount of recall but described shooting two men and a woman. When asked why he shot them, Lindh responded that he did not know. When asked if he cared to discuss the details of the shootings, he answered in the negative. At that point, Dr. Roberts suggested to Lindh that he might not want to talk with him at all, since Lindh did not have an attorney present. "Well," Dr. Roberts said to Lindh, "I'll wait a few minutes and come back and talk with you again." Dr. Roberts then left the defendant alone because, in his words:

> I wanted to be very sure that he understood, really, the purpose of my being there, and that he understood his rights in relation to anything that he might share with me, because, in general, I'd much prefer that he have an attorney

prior to that time, and that his attorney be aware that he was talking with me.

Twelve minutes later, Dr. Roberts returned to Lindh's bedside. Before talking with Lindh, Dr. Roberts again generally informed him of his rights concerning the interview. Lindh responded that he understood he did not have to talk with Dr. Roberts and understood why Dr. Roberts was with him. Lindh again affirmed that he understood that anything said would not be confidential. Again, Dr. Roberts suggested to Lindh that he might want to have an attorney before he talked. Lindh indicated, however, that he would talk with Dr. Roberts.

Dr. Roberts proceeded to question Lindh about the shootings as well as about his personal and family background. Lindh again indicated that he shot three human beings, none of whom he knew personally, that day at the City-County Building. He also spoke of two burglaries of his apartment that had taken place within the past week, the second occurring on the eve of the shootings. In addition, he indicated that he was dissatisfied and angry after the meeting he had with police at the City-County Building some minutes prior to the shootings. In response to questions from Dr. Roberts concerning his recent and current mental state, Lindh indicated that he was not suicidal, that he did not have significant depression, that he was not experiencing hallucinations, hearing voices or seeing visions, and that he had not been experiencing any significant eating or sleeping problems. Dr. Roberts later testified to his opinion that Lindh, based upon his ability to converse, absence of slurred speech, and responsive answers to specific questions the nature of which is indicated above, was able to understand what was taking

place and being said at the interview. Dr. Roberts stopped the interview at about 10:25 p.m., when Lindh indicated he was experiencing some pain.

On February 26, 1988, Lindh was arraigned and entered his pleas of not guilty and not guilty by reason of mental disease. At the request of the district attorney, the court appointed Dr. Roberts and Dr. Frederick Fosdal, another forensic psychiatrist, to examine the defendant on behalf of the state.

On March 8, 1988, Dr. Roberts became aware of allegations of professional misconduct against him. Specifically, he became aware that the University of Wisconsin Hospital was investigating an allegation that he had engaged in sexual misconduct with a female patient. He gave no particular thought at the time to the fact that there was a potential for a criminal charge to be made against him and that such a charge could involve the Dane County District Attorney's office. However, he generally knew at the time about the existence of a state law which could subject him, as a therapist, to criminal penalties if such an allegation as that made against him were true.[5] He was not aware of what penalty could be prescribed if he were charged and convicted. He presumed that, were any prosecution to be carried out, it would happen in Dane county, where the allegations were made and therefore would be conducted by the Dane county district attorney's office.

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[5] Specifically, sec. 940.22, Stats., provides criminal penalties for the sexual exploitation of a patient or client by a therapist.

In May 1988, Dr. Roberts learned that the Medical Examining Board was also investigating allegations of sexual misconduct by him with three female patients after the examining board made a request of him to provide it with records.

Dr. Roberts interviewed Lindh again on June 22, 1988, at the Dane county jail. The next day, June 23, University of Wisconsin Hospital attorneys met with Dane County District Attorney Hal Harlowe and referred to him the allegations against Dr. Roberts. At the same meeting, Harlowe informed those attorneys that he would transfer the matter to a special prosecutor. After the meeting, Harlowe immediately undertook to transfer the matter to the office of Milwaukee County District Attorney E. Michael McCann so as to establish that office as special prosecutor in the matter.

The Dane county district attorney's office sought this transfer in light of the fact that it had worked closely with Dr. Roberts on the prosecution of a number of past and pending cases. The district attorney's office considered that that relationship could constitute a conflict of interest for both Dr. Roberts and the district attorney's office if it were to investigate or prosecute Dr. Roberts. The Dane county circuit court officially appointed the Milwaukee county district attorney's office as special prosecutor on June 28 or 29, 1988.

Dr. Roberts was never contacted by any member or representative of the Dane county district attorney's office, nor was he contacted by any police officer, concerning the allegations against him. Nor did anyone from

the Dane county district attorney's office have any contact with Dr. Roberts' attorney about the allegations. Not until July 8, 1988, did Dr. Roberts become aware, through his attorney, that allegations had been referred to the Dane county district's office; at the same time, he became aware that the special prosecutor already had been appointed.

No formal or informal decision was made by the Dane county district attorney's office as to whether any criminal investigation or charges should be made against Dr. Roberts prior to the appointment of the special prosecutor. No one from the Dane county district attorney's office had any contact with the special prosecutor or discussed the matter with the special prosecutor after the special prosecutor appointment.

On August 17, 1988, Dr. Roberts submitted a report concluding that Lindh was not suffering from a mental disease or defect at the time of the shootings. On August 22, 1988, he interviewed Lindh for the last time.

On September 7, 1988, the defense filed a "Specific Demand for Exculpatory Evidence" regarding the complaint against Dr. Roberts before the Medical Examining Board. The complaint was attached to the discovery demand in which the defense set forth a list of specific questions to be answered, including questions as to when Dr. Roberts first became aware that the allegations had been made; when he was first aware the allegations could result in criminal charges; when the allegations were referred to the Dane county district attorney's office; when a special prosecutor was appointed, when Dr. Roberts became aware of this; and whether the Dane

county district attorney's office had made any decision as to whether charges should be filed.

The state promptly responded to the demand, denying that any of the material requested was exculpatory but fully answering each and every question set forth by the defense.[6] The state also filed, on September 12, 1988, a motion *in limine* requesting that the trial court prohibit any cross-examination of Dr. Roberts concerning the allegations of misconduct pending against him or concerning any ramification of those pending allegations, including but not limited to the status of Dr. Roberts' hospital privilege at the University of Wisconsin Hospital. The motion asserted that any such inquiry by the defense would be "totally irrelevant and immaterial to the issues" before the court.

A hearing on the state's motion was held on September 13, 1988. At that hearing, the defense acknowledged that the state had fully complied with its discovery demand. It also indicated it was alleging no wrongdoing or bad faith on the part of the prosecution. The parties argued the merits of the state's motion, the defense arguing that the circumstances raised serious questions relating to the bias, motive and interest of Dr. Roberts. The defense also argued more generally that Lindh should be permitted to explore the credibility of Dr. Roberts as an expert witness. In this connection, the defense, although it had no support in the record upon which to base its position, asserted that University of Wisconsin Hospital

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[6] The information contained in the state's answers, entirely undisputed by the defense, is incorporated within this factual portion of this opinion.

had temporarily suspended Dr. Roberts' privilege to treat patients at that institution after conducting its own investigation. Lindh argued that he should be permitted, during his own questioning on Dr. Roberts' qualifications, to question Dr. Roberts concerning the allegations against him and his purported suspension so that the prosecution would not be able to present Dr. Roberts as "pure as the driven snow."

The state argued that the allegations contained in the board's complaint were not relevant to the issues of bias, motive or interest. The state argued that the allegations did not go to bias because when Dr. Roberts was retained and appointed, the prosecution was not looking to him for any particular result from his evaluation of Lindh but simply his professional opinion. In this regard, the state noted that some five weeks prior to the filing of his report Dr. Roberts was aware that a special prosecutor had been appointed and that the Dane county district attorney's office had absolutely no involvement with the case. The prosecutor argued it was too implausible to think Dr. Roberts would file a report with the hope that it would help him in Dane county when he knew that the matter was under Milwaukee county jurisdiction. Even if the proffered evidence were marginally relevant, the state said, it would be extremely prejudicial and cause the jury to focus on an issue unrelated to the question of Lindh's mental capacity at the time of the shootings, and therefore should not be allowed.

Concerning the defense's more generally stated line of inquiry as to Dr. Roberts' character or credibility as an expert witness, the state responded that an expert witness should be treated like any other witness and that there

was no basis to question Dr. Roberts about the allegations. The state argued that cross-examination pertaining to the allegations of sexual misconduct and purported hospital suspension would serve no purpose insofar as those matters did not reflect on Dr. Roberts' qualifications as an expert witness. Such cross-examination, the prosecution said, would serve only to "trash" Dr. Roberts, to put him on trial and draw the issue away from the mental responsibility of Lindh.

Following extensive arguments by the parties, the trial court, after having "given a lot of thought to this," found the proffered evidence to be "irrelevant and immaterial." Rejecting the defense's theories of relevancy, the trial court expressly considered that, particularly given that the matter of the allegations against Dr. Roberts was transferred "almost instantaneous[ly]" out of the Dane county district attorney's office to the office of the special prosecutor, there was no possibility of bias, motive or interest on the part of Dr. Roberts. "I do not find anything in this record which would support or permit counsel to inquire as to [that issue]," the court said. The trial court added:

> And I think it's fair to say that, no matter what [Dr. Roberts does] for the Dane county district attorney's office, [he] would not be able to influence any result, as a result of [the special prosecutor's] investigation or any judge that might ultimately hear it, should there be any criminal charges filed.

Even though it had already found the proffered evidence not relevant, the trial court apparently assumed for the sake of argument that the proffered evidence might

be at least marginally relevant such that it should be "balanced" against the risk of unfair prejudice so as to determine its admissibility pursuant to sec. 904.03, Stats. In conducting its balancing test, the trial court found that the risk of unfair prejudice to the state would outweigh any relevance. The court expressly noted that the allegations against Dr. Roberts were nothing more than allegations and said that there was the risk that the jury would think that "if there's smoke, there's fire." Thus, the court held that cross-examination pertaining to the allegations against Dr. Roberts and his purported hospital suspension was not admissible. The court therefore granted the motion *in limine*.

At the same time, the court gave defense counsel the right to *voir dire* Dr. Roberts outside the presence of the jury, and a voir dire hearing took place before Dr. Roberts testified at phase II of the trial. The hearing essentially amounted to a reiteration by Dr. Roberts of much of the information contained in his response to Lindh's discovery demand. In addition, Dr. Roberts stated at the hearing that when he was first called into the case by Assistant District Attorney Burr he was not aware that any allegations against him were threatened. He also stated that he was not aware that District Attorney Harlowe had met with University of Wisconsin Hospital attorneys until the date of the hearing. The defense did not dispute these statements by Dr. Roberts. Based upon the voir dire hearing, the trial court found no basis to alter its ruling granting the motion *in limine*.

At phase II, Dr. Ezra Griffith, a forensic psychiatrist, testified for the defense. After giving a lengthy introduction as to his professional qualifications and background,

Dr. Griffith testified to a reasonable degree of medical certainty that on the day of the killings the defendant was in a psychotic state which he diagnosed as a "brief reactive psychosis," and that as a result of that psychotic state Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct and lacked substantial capacity to conform his conduct to the requirements of law. He also testified to a reasonable degree of medical certainty that Lindh had been suffering from mental diseases or disorders long before January 15, 1988. He characterized these long-term disorders as "mixed personality disorder."

The principal expert witness for the state was Dr. Roberts. At the outset of his testimony, Dr. Roberts indicated that he was: a faculty member at the University of Wisconsin Medical School; "on the adjunct faculty at San Francisco Theological Seminary;" chairperson of conferences "relating to religion and mental health;" previously "honored . . . as essentially the mid-west psychiatrist of the year;" and, a grandfather. Dr. Roberts proceeded to give his opinion that the defendant did not suffer a mental illness at the time of the crimes, that a personality disorder is not a mental disease, and that a conduct disorder is not a mental disease. He testified to his opinion that the defendant was not suffering a brief reactive psychosis at the time of the offenses. He gave his opinion that the defendant knew his conduct was wrong and that he could conform his conduct to the requirements of the law.

The state also called Dr. Fosdal who stated that he diagnosed Lindh as suffering a mixed personality disorder. He testified, however, that such a disorder does not

prevent one from appreciating the wrongfulness of his conduct or from conforming his conduct to the requirements of the law. He testified to his opinion that the defendant did not suffer a brief reactive psychosis at the time of the crimes, did not have a mental disease, and suffered no impairment of his ability to conform his conduct to the requirements of the law.

* * *

With respect to the first issue, Lindh contends that the evidence he wished to show on cross-examination of Dr. Roberts was wrongfully excluded to the extent it might have shown bias on the part of Dr. Roberts, who, facing the possibility of a criminal investigation and criminal charges, allegedly might have wanted to curry favor with the prosecutor by reporting a diagnosis of Lindh's mental state that would favor the prosecution against Lindh. Lindh also asserts more generally that the evidence was relevant to Dr. Roberts' character and credibility.

The confrontation clause of the Sixth Amendment of the United States constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." By virtue of the fourteenth amendment, this right is applicable to the citizens of this state. Article I, sec. 7 of the Wisconsin constitution essentially provides the same right, indicating that an accused has a right to meet his witnesses "face to face." " ' "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" ' " *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986), *quoting Davis v. Alaska*, 415

U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (Emphasis in original). " '[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' " *Id.* at 678-79, 106 S.Ct. at 1435.

Nevertheless:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Id. at 679, 106 S.Ct. at 1435. The confrontation clause " 'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.' " *Id.*, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (Emphasis in original).

Wisconsin evidence law conforms with these fundamental precepts. If evidence is relevant, as defined by sec. 904.01, Stats.,[7] it is admissible, unless its introduction would be prohibited by another rule or the constitutions

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[7] Section 904.01, Stats., provides:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

of the United States or Wisconsin. Section 904.02, Stats.[8] Even if admissible, evidence may be excluded if its probative value is substantially outweighed by other factors, including risk of unfair prejudice. Section 904.03.[9] Section 906.08.[10] pertains specifically to evidence of character and conduct of witnesses.

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[8] Section 904.02, Stats., provides:

> All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

[9] Section 904.03, Stats., provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[10] Section 906.08, Stats., provides as follows:

> Evidence of character and conduct of witness. (1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11(2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: a) the evidence may refer only to character for truthfulness or untruthfulness, and b), except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's

"The criterion of relevancy is whether the evidence sought to be introduced would shed any light on the subject of inquiry." *Rogers v. State*, 93 Wis.2d 682, 688, 287 N.W.2d 774 (1980). In *Rogers*, we also said that:

> The proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony.

Id. at 689, 287 N.W.2d 774. The scope of cross-examination is not limited to the scope of the direct examination. *Id.* However, to be relevant, the proffered evidence must have a logical or rational connection with the fact sought to be provided. *State v. Williamson*, 84 Wis.2d 370, 384-85, 267 N.W.2d 337 (1978). There must be a reasonable relation between the evidence sought to be introduced and the proposition to be proved before the cross-examination will be allowed. Rogers, 93 Wis.2d at 691, 287 N.W.2d 774.

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credibility, other than conviction of crimes as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

We previously have noted that evidentiary determinations are a matter of trial court discretion. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983); *Rogers*, 93 Wis.2d at 689, 287 N.W.2d 774. This discretion of the trial court is broad. *State v. Oberlander*, 149 Wis.2d 132, 140, 438 N.W.2d 580 (1989). The appellate court should reverse a trial court's determination to limit or prohibit a certain area of cross-examination offered to show bias only if the trial court's determination represents a prejudicial abuse of discretion. *Williamson*, 84 Wis.2d at 384-85, 267 N.W.2d 337); *State v. Whiting*, 136 Wis.2d 400, 422, 402 N.W.2d 723 (Ct.App.1987). In *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981), this court stated:

> It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

See also Oberlander, 149 Wis.2d at 140-41, 438 N.W.2d 580. No abuse of discretion will be found if a reasonable basis exists for the circuit court's determination. *Oberlander*, 149 Wis.2d at 141, 438 N.W.2d 580.

We hold that the trial court did not abuse its discretion in determining that the proffered evidence was not relevant to show bias, motive or interest or more generally the character or credibility of Dr. Roberts as an expert witness. The court of appeals erred in substituting its discretion for that of the trial court.

In reaching its decision, the court of appeals concluded Lindh should have been allowed to cross-examine

Dr. Roberts "as to the fact that allegations of misconduct were pending against him and the serious effect upon his profession and livelihood if he were convicted of the charges alleged" and that Lindh should have been allowed to inquire "whether, during the period in question, he was investigated with respect to possible criminal conduct which, upon conviction, would have serious professional and personal consequences." This conclusion ignores the fact that the trial court had a reasonable basis to conclude that the proffered evidence simply was not in any way relevant.

From the time Dr. Roberts first interviewed Lindh in the hospital on January 15, 1988, through the times that he interviewed him in June 1988 and August 1988 and up through and including September 1988, there is no evidence in the record that a criminal investigation was being conducted – or, indeed, that one ever was conducted – regarding any allegations against Dr. Roberts. At most, it is known that the matter of the complaints by Dr. Roberts' patients against him was referred to the Dane county district attorney's office in June and that the matter was immediately transferred to the Milwaukee county district attorney's office for any investigation it would choose to pursue and any prosecution it would choose to conduct. There is no evidence that after that time and as of the time of trial, the Milwaukee county district attorney's office ever began any criminal investigation.[11]

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[11] An investigation of Dr. Roberts eventually was undertaken by the special prosecutor who brought charges against Dr. Roberts. Dr. Roberts pleaded no contest to these

Clearly, up until July 8, 1988, there was no reasonable possibility for bias, motive or interest on the part of Dr. Roberts because until that date he did not know that any allegations had been referred to the Dane county district attorney's office. Because Dr. Roberts became aware of the immediate transfer of the matter to the special prosecutor at the same time, he had no reason to believe after July 8, 1988, that the Dane county district attorney's office would be in a position to prosecute him and thus possibly favor him in exchange for his testimony. Dane county was not in a position to make any "deals," reduce any charges, or even make any recommendation as to any criminal investigation or prosecution against Dr. Roberts and Dr. Roberts knew it. He therefore had no reason to favor the prosecutor in the instant case by testifying or giving a report favorable to him.

The relationship between the Dane county district attorney's office and Dr. Roberts which would be necessary to suggest bias, interest or motive simply did not exist. The disclosure provided by the prosecutor upon the request of the defense and the *voir dire* of Dr. Roberts unequivocally showed the same thing. There is no reason whatsoever to conclude that there was fertile ground for even the seed of a "deal" to be sewn and to germinate under these circumstances. To suggest that Dr. Roberts' testimony would be influenced in favor of the prosecution under these circumstances amounts to mere speculation. There being no nexus between the future criminal

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charges. Although the record does not indicate the exact dates of these events, it is clear that they all occurred subsequent to Dr. Roberts' testimony at phase II of Lindh's trial.

investigation and prosecution of Dr. Roberts, if any were to be undertaken, and the Dane county district attorney's office, a jury could not reasonably find a logical connection between the two, because none existed. Thus, it was not an abuse of discretion not to allow the matter to be brought up on cross-examination.

Analogous decisions from other jurisdictions support our conclusion. In *Gutierrez v. State*, 681 S.W.2d 698, 706-07 (Tex.Ct.App.1984), the court held it was not an abuse of discretion to prohibit cross-examination of a state witness on pending charges under circumstances where the county attorney, not the district attorney prosecuting the defendant's case, had authority over the witness's pending charges; no deals had been made with the witness; nobody in the district attorney's office had suggested lenient treatment and there was no evidence elicited at the *voir dire* of the witness which suggested he had a self-interest in his testimony.

Similarly, in *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985) (en banc), the court held that it was not unreasonable to refuse to allow the defendant to cross-examine a state witness on a pending contempt charge. The county attorney prosecuting the case in which the witness was to testify was not involved in the pending contempt charge. A special, independent prosecutor had full responsibility for the contempt charges. Thus, the court held that the pending charge "would not have indicated that [the witness's] testimony was colored by any hope of lenient treatment from the County Attorney." 145 Ariz. at 533, 703 P.2d at 477.

These cases stand for the proposition that, where a witness is himself subject to a prosecution by those who are separate and distinct from those who have called him as a witness, there is no reasonable basis to believe the witness has a motive to curry favor or hope for leniency by virtue of his testimony. This clearly is the situation in the instant case. Because of the fact that any prosecution by the special prosecutor against Dr. Roberts at some point in the future was merely a possibility, there was no reasonable basis to believe that Dr. Roberts would color his report or testify to some sort of bias, motive or interest. As courts have indicated, cross-examination for bias is not opportune when there exists the mere possibility of future or potential charges. *See generally, State v. Grasso*, 172 Conn. 298, 374 A.2d 239, 242 (1977); *People v. Simmons*, 99 Ill.App.3d 519, 54 Ill.Dec. 951, 955, 425 N.E.2d 1168, 1172 (1981). It is not even the case that, as a psychiatric professional, Dr. Roberts was called upon to "rise above" influences that might lead to bias, motive or interest on his part, for no such influences ever existed.

The cases upon which Lindh relies in this regard[12] stand in sharp contrast to the situation in the case at bar, although the defendant presents them for the broad proposition that a witness may be cross-examined about the threat of criminal prosecution and not just about pending charges. In the cases offered by Lindh, the evidence had a

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[12] Lindh relies upon *Cowheard v. State*, 365 So.2d 191 (Fla.Dist.Ct.App.1978); *State v. Chesnut*, 621 P.2d 1228 (Utah 1980); *United States v. Hitchmon*, 609 F.2d 1098 (5th Cir.1979); *Burr v. Sullivan*, 618 F.2d 583 (9th Cir.1980); *United States v. Onori*, 535 F.2d 938 (5th Cir.1976); and *Greene v. Wainwright*, 634 F.2d 272 (5th Cir.1981).

direct and immediate nexus to bias, motive to testify falsely or motive to favor the prosecution. The cases involved actual or pending criminal charges or a direct and immediate ongoing criminal investigation or imminent threat of criminal charges by a government agent directly involved in the case in which the witness was to testify. In the case at bar, there were no pending criminal charges. There was no ongoing criminal investigation. If a criminal investigation were undertaken and charges were brought in the future, those charges would be brought by the special prosecutor, not by the Dane county district attorney's office.

Certain cases cited by Lindh generally evidence what the United States Supreme Court in *Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, called a "prototypical form of bias." In Van Arsdall, the trial court prohibited any cross-examination on the fact that the state had dropped a public drunkenness charge, actually filed, in exchange for the witness's promise to speak with the prosecutor about a murder. The Supreme Court held that the total prohibition of all inquiry into this "prototypical form of bias" violated the defendant's constitutional right of confrontation by "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* at 679-80, 106 S.Ct. at 1435.

Although *Van Arsdall* did not specifically define "prototypical form of bias," the context of the case makes it clear that the court was referring to a situation in which a witness might have or realistically perceive an interest in testifying so as to favor the prosecution. For example, in

Van Arsdall, the witness was in a position to and actually did testify in exchange for reduction in charges or sentence.

Other cases cited as persuasive by Lindh manifest a comparable prototypical form of bias. In *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974), the juvenile witness was on probation and thus distinctly "vulnerable," as the Supreme Court described it, to influences which might raise questions of biases, ulterior motives and prejudices that "relate directly to issues or personalities in the case at hand." Specifically, because of his probationary status, the witness might have been effectively encouraged to make a faulty initial identification of the defendant in order to shift suspicion away from himself as to the same incident, and he also might have been subject to undue pressure from the police and made his initial identifications under fear of possible probation revocation. *Id.* at 311, 317, 94 S.Ct. at 1107, 1111. This in turn could have affected his later in-court identification. *Id.* at 317, 94 S.Ct. at 1111.[13]

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[13] In this regard, the United States Supreme Court noted that " '[a] *partiality* of mind at some former time may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying.' " *Id.* n. 5 (Emphasis in original). While the defendant in the case at bar might have attempted to use this statement to argue that Dr. Roberts might have had a meaningful "partiality of mind at some former time" comparable to that envisaged by the Supreme Court in Davis, such an argument would be a manifestly unreasonable one. There is absolutely nothing in the record to suggest any reasonable possibility that Dr. Roberts ever held any bias, motive or interest that conceivably might have affected his testimony.

There was also a prototypical form of bias evident in *State v. Lenarchick*, 74 Wis.2d 425, 247 N.W.2d 80 (1976), where charges were pending against the witness. Prior to trial, one charge was dropped and two charges against the witness were being held open. Addressing the problem as one of constitutional dimension, the court said that:

> When a witness has been criminally charged by the state, he is subject to the coercive power of the state and can also be the object of its leniency. The witness is aware of that fact, and it may well influence his testimony.

Id. at 447-48, 247 N.W.2d 80. Under such circumstances, this court held, "[a] defendant, as an ingredient of meaningful cross-examination, must have the right to explore the subjective motives for the witness' testimony." *Id.* at 448, 247 N.W.2d 80.

In *State v. Balistreri*, 106 Wis.2d 741, 317 N.W.2d 493 (1982), a prototypical form of bias was effectively accorded proper exposure at trial. The witness had been arrested for criminal acts resulting in plea negotiations which reduced the witness's potential sentence from 105 to 40 years. In ruling that the trial court properly excluded testimony as to the factual details of prior criminal acts of the witness, the nature and number of which were already made known to the jury by the witness on direct examination, the court said that:

> 'The main objective [of allowing cross-examination pertaining to a witness' criminal acts and plea negotiations] is to show that the witness may have expected leniency or immunity from prosecution if he gave testimony in favor of the state, and it is necessary to show the commission of wrongful acts in order to establish the basis for such an expectation.'

Id. at 753, 317 N.W.2d 493, *quoting Lenarchick*, 74 Wis.2d at 447, 247 N.W.2d 80. Thus, while the cross-examination properly could have included inquiry into the general existence of the plea negotiations and the criminal acts to which the negotiations were related, such was not the case with respect to the factual details of the prior criminal acts of the witness in *Balistreri*, because they would not show that the witness may have expected leniency or immunity in exchange for his testimony.

In cases where there exists a prototypical form of bias, the possibility of bias, motive and interest of the witness is particularly distinct and immediate. The witness has an ongoing, dual relationship with the prosecutory actors. On the one hand, the witness as such is being of some service to the prosecution by giving his testimony; on the other hand, his status with respect to the same prosecution is "vulnerable." Criminal process of some sort against the witness, even if only at its initial stages, is a reality. Usually, it is being carried out by the prosecuting attorneys who are depending on his service as a witness; at the very least, it is being carried out in the same jurisdiction as the one in which the witness is offering his testimony. Under such circumstances, there usually is a reasonable inference that the witness is or considers himself to be in a position of being effectively more or less "vulnerable" to factors that could influence his testimony. The witness's acts, relationship or situation with respect to the state might be likely to produce at least a strong suspicion of bias, motive and intent in the

eyes of a jury. A jury might reasonably have found the evidence "furnished the witness a motive for favoring the prosecution in his testimony." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435.

Lindh does not expose a "prototypical form of bias." Here, the prosecution had not dropped any pending criminal charges against Dr. Roberts, no charges had been reduced or favorably disposed, and Dr. Roberts was not on parole or probation or in custody. There was only the possibility that allegations of sexual misconduct with patients could form the basis of criminal charges. There is not even any claim that a criminal investigation was actually being conducted. Because substantial steps were taken immediately by the Dane county district attorney's office to appoint the special prosecutor upon the referral of the investigation of Dr. Roberts to the district attorney's office, Dr. Roberts had no "prototypical" bias, interest or motive to curry favor with the Dane county district attorney's office which was prosecuting Lindh, because any charges that would be brought against Roberts would be brought by the special prosecutor.

Although the basis of Lindh's other theory of relevancy is not altogether clear, it appears to proceed from a view that the exclusion of the proffered evidence is error because, as he describes it, the state was allowed to present Dr. Roberts as if his character was "pure as the driven snow." Noting that, at the start of his testimony, Dr. Roberts introduced himself as a grandfather, a faculty member at a theological seminary, the chairperson of conferences on religion and mental health, and as recipient of an award essentially naming him "midwest psychiatrist of the year," Lindh apparently argues that the

mention of such facts in front of the jury entitled him to the particular cross-examination of Dr. Roberts that he desired. Again, we find that the trial court did not abuse its discretion in finding the proffered evidence "irrelevant and immaterial."

The character of a witness may be impeached only in regard to matters which go directly to his reputation for truth and veracity. *Barren v. State*, 55 Wis.2d 460, 461-66, 198 N.W.2d 345 (1972). We have long considered that on cross-examination into the character of a witness, use of irrelevancies, insinuating that a person is of bad moral character, tending to degrade him in the eyes of the jury, is not a proper impeachment device. *Banas v. State*, 34 Wis.2d 468, 474, 149 N.W.2d 571, *cert. denied* 389 U.S. 962, 88 S.Ct. 346, 19 L.Ed.2d 373 (1967). Virtually by definition, such evidence is not relevant, tending only to prejudice the jury against the witness.

The fact that Dr. Roberts may have engaged in professional misconduct and may have been subject to disciplinary measures as a result would not tend to make more or less likely the accuracy and correctness of his diagnosis and professional opinion in this case. The proffered evidence does not have any reasonable tendency to show Dr. Roberts was less qualified to examine and diagnose Lindh and render an opinion as to Lindh's mental capacity and no reasonable jury could so find. Nor would the cross-examination have cast light on Dr. Roberts' character for truthfulness and untruthfulness. The subjects that Lindh wished to discuss on cross-examination were completely unrelated to Dr. Roberts' truthfulness and abilities as an expert witness.

Far from presenting himself as "pure as the driven snow," as the defense asserts he did, Dr. Roberts simply testified to his past experience and professional background, as do all expert witnesses. The fact that he offered certain innocuous family information without objection from the defendant does not mean that Lindh had a right to cross-examine on the matter of the sexual misconduct allegations.

Dr. Roberts' introduction was qualitatively no different from that of defense psychiatric expert Dr. Griffith, who testified he was: acting director of Connecticut Mental Health Center in New Haven, Connecticut, and was associate professor of psychiatry at Yale University School of Medicine and an associate professor in the Department of Afro-American studies at Yale. Dr. Griffith also testified that he went to Harvard University, took his medical degree at University of Strasburg in France, did residency at the Albert Einstein College of Medicine in New York, that he has a specialty certification in psychiatry and forensic psychiatry, that he teaches a course in the department of Afro-American studies that has to do with the psychological dimensions of black autobiographies, that he is a consultant to the Pan American National Health Organization, Project Hope, and the Commission of Security and Cooperation in Europe of the United States Congress, that he is editor of Black Psychiatrists of Americans Quarterly, that he is on the executive committee of the Black Psychiatrists of America, that he was honored by a fellowship of American Psychiatric Association and received a traveling fellowship from the Solomon Fuller Institute, that he serves on various boards, and that he has authored a number of articles.

Numerous cases have held that allegations of professional wrongdoing, misconduct or negligence that is unrelated to the case on trial is not a proper subject of impeachment of an expert medical witness. In *State v. Paradise*, 213 Conn. 388, 567 A.2d 1221, 1229-30 (1990), inquiry on cross-examination into a prior investigation of official misconduct by the witness in his prior position as chief medical examiner of New York City would have been of dubious relevance and, moreover, would have led to a mini-trial on the circumstances of unrelated cases. In *Downey v. Weston*, 451 Pa. 259, 301 A.2d 635, 639 (1973), the court held that it was not an abuse of discretion or an error of law for the court to bar cross-examination of a medical expert witness to establish that he had misconducted himself by failing to observe a principle of medical ethics. In *Noble v. Lansche*, 735 S.W.2d 63 (Mo.Ct.App.1987), it was held reversible error for the trial court to allow an expert witness in a medical malpractice case to be cross-examined on his voluntary surrender of his license to dispense controlled narcotics, due to his own drug problem. The court held the expert's former drug problem was unrelated to his skill, knowledge and qualifications to express an expert opinion in the case; neither the drug abuse nor the surrender of his license affected his qualification as an expert witness or his credibility. The only purpose of such evidence could be to cause disparagement over the expert's testimony by reason of irrelevant misconduct.

See also Schneider v. Revici, 817 F.2d 987 (2d Cir.1987) (fact that an expert witness's license has been temporarily suspended pending an investigation); *Downey v. Weston*, 451 Pa. 259, 301 A.2d 635 (1973) (expert's failure to

observe a principle of medical ethics); *Sanchez v. Bay General Hospital*, 116 Cal.App.3d 776, 172 Cal.Rptr. 342 (1981) (question why doctor did not have privileges at certain hospitals); *Miceikis v. Field*, 37 Ill.App.3d 763, 347 N.E.2d 320 (1976) (prior malpractice litigation); *see also Pyle v. Morrison*, 716 S.W.2d 930 (Tenn.Ct.App.1986).

The trial court, even after finding the proffered evidence irrelevant, went on to assume, apparently for the sake of argument, that the evidence was relevant, analyzing the problem pursuant to sec. 904.03, Stats.[14] It then

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[14] Apparently because in conducting this balancing test the trial court did not explicitly refer to sec. 904.03, Stats., and did not expressly state that it would engage in "balancing," Lindh has suggested that the trial court failed to exercise its discretion. Because a trial court's failure to exercise discretion constitutes an outright abuse of discretion, *State v. Hutnik*, 39 Wis.2d 754, 764, 159 N.W.2d 733 (1968), we would reverse the trial court if Lindh's argument were meritorious. However, we find that it is not meritorious.

The fact that the trial court did not expressly state the name of sec. 904.03, Stats., or use the words "weighing" or "balancing" or some similar word or words to describe its analysis, does not mean, that the court failed to exercise its discretion. We do not recognize such a "magic words" argument.

If anything, a trial court's failure to generally refer to its sec. 904.03, Stats., balancing tests might under certain circumstances constitute a "fail[ure] to set forth its reasoning." *See Pharr*, 115 Wis.2d at 343, 340 N.W.2d 498. Where the trial court does not "set forth its reasoning" for its decision regarding the admission of evidence, we must search the record for a reasonable basis for the decision. *Id.* We will not find an abuse of discretion if any reasonable basis exists for the decision. *Id.* at 342, 340 N.W.2d 498. The fact that a trial court does not expressly balance the probative value of the evidence against the risk of unfair

found that any relevance was outweighed by the risk of unfair prejudice from admission of the evidence. We find that the trial court was well within its discretion in that finding. Even if the proffered evidence could be considered marginally relevant to bias, motive or interest or to the character or credibility of Dr. Roberts as an expert, it was reasonable to conclude that the risk of unfair prejudice from admission of the evidence far outweighed the probative value of the evidence, and the cross-examination could have been properly prohibited for that reason.

As the Supreme Court said in *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435, bias evidence which is only marginally relevant or which may confuse the issues is excludable. As stated in *Williamson*, 84 Wis.2d at 384-85, 267 N.W.2d 337, evidence which is relevant to provide bias, like evidence offered to prove other facts, "must also satisfy sec. 904.03, Stats., requiring the trial court to weigh the probative effect of the evidence against its prejudicial effect." *See also, United States v. Abel*, 469 U.S. 45, 54-55, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984).

> Evidence is unfairly prejudicial if it has a 'tendency to influence the outcome by improper means' or it is 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish' or otherwise causes a jury 'to base its

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prejudice does not relieve the appellate court of its obligation to do so, if the result would be to sustain the judgment or order.

As for the trial court's actual application of the balancing test in this case, we consider the trial court to have sufficiently set forth its reasoning, *e.g.*, by noting the prejudicial effects that the jury might think "where there is smoke, there's fire."

> decision on something other than the established propositions of the case.' *See Christensen v. Economy Fire & Cas. Co.*, 77 Wis.2d 50, 61, 61 n. 11, 252 N.W.2d 81 (1977).

Lease America Corp. v. Ins. Co. of N. America, 88 Wis.2d 395, 401, 276 N.W.2d 767 (1979).

Other courts have delineated some of the prejudice factors which may warrant the exclusion of bias evidence. One factor is whether the evidence would divert the trial to an extraneous issue. *Hossman v. State*, 467 N.E.2d 416, 418 (Ind.1984). A court can and should exclude bias evidence which has little bearing on the witness's credibility, but which would impugn the witness's character because such evidence "opens the door to improper considerations and lends to the confusion of the jury by placing undue emphasis on collateral matters." *People v. Cole*, 654 P.2d 830, 833 (Colo.1982). If the bias evidence, taken as a whole, might have directed the jury's attention away from the case under consideration, it may be prejudicial. *Id.* at 834.

The trial court may exclude bias evidence if the very slight probative value of the evidence on the issue of bias fails to overcome its strong likelihood of confusion of the issues and undue delay. *United States v. Jarabek*, 726 F.2d 889, 902 (1st Cir.1984). The appellate court should not find the trial court abused its discretion when the relevance of the proffered bias evidence was unclear and the risk of prejudice was real. *United States v. Sellers*, 658 F.2d 230, 232 (4th Cir.1981). The trial court may prohibit cross-examination in a certain area where to permit it would open up extraneous matters, for the trial court " 'has responsibility for seeing that the sideshow does not take

over the circus.' " *United States v. Brown*, 547 F.2d 438, 446 (8th Cir.1977).

In the instant case, the risk of unfair prejudice was great. Allegations of sexual misconduct with patients against a psychiatrist have great potential to unduly prejudice the jury against the witness. Cross-examination on this matter would have distracted the jury from the real issues in the case and would have caused the jury to speculate about unproven charges against the witness. A mini-trial on Dr. Roberts' conduct could have ensued.

The trial court clearly did not abuse its discretion in finding that any relevance of the proffered evidence was outweighed by other factors. Pointing out that the allegations against Dr. Roberts were nothing more than allegations and there was a risk that the jury would think that "if there's smoke, there's fire," the trial court accurately focused on what would have amounted to an unfairly prejudicial admission.

Moreover, in reviewing the trial court's ruling, the appellate court should conclude that the trial court relied on the considerations expressed by the prosecutor as grounds for the court's ruling, where the court obviously acquiesced in the prosecutor's explanation, but did not expressly articulate all of its reasoning itself. *See Hagenkord v. State*, 100 Wis.2d 452, 464, 302 N.W.2d 421 (1981). In this regard, although we do not consider the trial court to have "acquiesced" as such, we note that in arguing to prohibit the cross-examination, the prosecutor specifically argued that cross-examination about the pending allegations of sexual misconduct with patients would serve no purpose except to "trash" Dr. Roberts, that it

would distract the jury from the real issue, the mental responsibility of Lindh, and that it would cause the jury to speculate about an unrelated issue. These are traditional grounds of prejudice under sec. 904.03, Stats.

We hold that the trial court did not abuse its discretion or otherwise err insofar as it concluded that any relevance of the proffered evidence was outweighed by other considerations, including the risk of unfair prejudice, such that it was not improper to exclude the evidence.

We now turn to the second issue, in which Lindh argues that the trial court erred in refusing to suppress the use of statements taken by Dr. Roberts within hours of Lindh's arrest. Lindh argues that the right against self-incrimination applies to phase II of a trial and that his rights under *Miranda* were not honored.

The Fifth Amendment to the United States Constitution and Article I, sec. 8 of the Wisconsin Constitution guarantee a defendant a right against self-incrimination. Lindh specifically contends that Miranda applied in his case insofar as Dr. Roberts conducted his first interview with him at the hospital on the night of the crimes, before the defendant had interposed an insanity defense and before Roberts had officially been appointed as one of the state's experts. Lindh makes this assertion despite the fact that his statements to Dr. Roberts were admitted only at the insanity phase of the trial, only on the issue of Lindh's mental responsibility, only after Lindh interposed an insanity defense and only after he presented expert opinion evidence in support of that defense.

We note as a general matter that the constitution does not apply to prohibit the admission of testimony of a state psychiatric expert in circumstances where the defendant already has interposed an insanity defense and has presented expert testimony in support of that defense. *See Buchanan v. Kentucky*, 483 U.S. 402, 421-22, 107 S.Ct. 2906, 2916-17, 97 L.Ed.2d 336 (1987); *Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989); *United States v. Byers*, 740 F.2d 1104, 1110-11 (D.C.Cir.1984); *Riles v. McCotter*, 799 F.2d 947, 953 (5th Cir.1986); *Schneider v. Lynaugh*, 835 F.2d 570, 575-76 (5th Cir.1988); *Granviel v. Lynaugh*, 881 F.2d 185, 190 (5th Cir.1989); *State v. Hope*, 96 N.C.App. 498, 386 S.E.2d 224 (1989); *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989).

Lindh relies upon *United States v. Hinckley*, 672 F.2d 115 (D.C.Cir.1982) and *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984) to support his contention that the right against self-incrimination applies to phase II of a trial. Both cases are clearly distinguishable. In *Hinckley*, F.B.I. agents continued to interrogate the defendant after he requested an attorney and after the defendant said he wanted the interview stopped. The government argued it should at least be allowed to use the defendant's statements and psychiatric opinion evidence based on the police reports of the interview to rebut the defendant's insanity defense. The court held evidence gleaned from the police officer's egregious violation of the defendant's *Miranda* rights could not be used, even for this limited insanity rebuttal purpose, because exclusion was necessary to curtail such misconduct. *Hinckley*, 672 F.2d at 133-34. In *Cape v. Francis*, the court held an expert's opinion that the defendant was sane and criminally responsible could not be

admitted at phase I of the case. Moreover, the expert's opinion was based upon the defendant's unwarned statements made during a court-ordered psychiatric exam, and the defendant never raised the insanity defense.

Lindh also relies, unpersuasively, upon *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987), which involved a police interview and not a psychiatric interview. The question of whether the fifth amendment applied to the insanity issue was not considered. Finally, Lindh relies on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In *Estelle*, the trial court had *sua sponte* appointed a psychiatrist to examine the defendant and determine his competency. After the defendant was found guilty, the state used the psychiatrist's opinion as evidence of the defendant's future dangerousness at the penalty phase of the trial, where the state had the burden of proving future dangerousness in order to secure the death penalty. At the competency hearing, the psychiatrist had not informed the defendant that he had the right to remain silent and he had given the defendant no indication that the court-ordered examination would be used to gather information necessary to decide whether he would receive the death penalty. The court held that under "these distinct circumstances," the defendant's fifth amendment privilege against self-incrimination was violated. *Id.* at 466, 101 S.Ct. at 1875.

By its own terms, *Estelle* is limited to its facts. In fact, the Supreme Court in *Estelle* clearly appears to have exempted from its holding a situation such as in the instant case, indicating that a defendant who asserts the insanity defense and introduces supporting psychiatric evidence cannot also preclude the state from conducting

an examination and introducing the product of that examination. *Estelle*, 451 U.S. at 468, 101 S.Ct. at 1875.

In *Estelle*, the defendant made his statements unwittingly, unknowing that the state would use them to secure the death penalty, on which issue it had the burden of proof beyond a reasonable doubt. In contrast, in the instant case, the defendant made his statements knowingly. More important, he had the burden of proof, and the evidence from the interview was only used for the purpose of rebutting the defendant's insanity argument. The state was not using the "simple, cruel expedient" of forcing evidence from the defendant's own lips to meet its burden of proof. *Id.* at 462, 101 S.Ct. at 1872, quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-82, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961).

We focus on the nature and purpose of the examination and not on its timing. The fact that Dr. Roberts conducted his interview before and not after Lindh interposed his insanity defense would not appear relevant in this regard. There are valid legal and policy reasons for this focus.

A psychiatric interview designed to ascertain a defendant's mental responsibility, evidence of which is not admitted until phase II of trial, is not accusatory in nature. It looks at the past conduct of which the interviewer was already aware. We consider that *Miranda* warnings, which are aimed against involuntary self-incrimination, are a prerequisite neither to such an interview nor to admission of the results of the interview at phase II. *Cf. State v. Knapp*, 111 Wis.2d 380, 388, 330

N.W.2d 242 (Ct.App.1983); *State v. Heffran*, 129 Wis.2d 156, 165-66, 384 N.W.2d 351 (1986).

Complete information is essential on the insanity defense, and the best information comes from an expert examination of the defendant himself. To the extent official misconduct needs to be deterred, sufficient deterrence is adequately provided by excluding the evidence from the guilt phase. The great importance and reliability of the defendant's own statements on this issue should not be undercut by any incremental benefits to be gained by suppression. Reliability of the fact-finding process would be decreased by application of the constitutional privilege. *Cf. Allen v. Illinois*, 478 U.S. 364, 374-75, 106 S.Ct. 2988, 2994-95, 92 L.Ed.2d 296 (1986). Admission of the results of a state psychiatric examination of a defendant who raises the insanity defense does not tarnish or diminish the "noble aspirations" and "fundamental values" underlying the privilege against self-incrimination. *See generally Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964).

We thus hold that the constitutional privilege against self-incrimination does not require the exclusion of results of a psychiatric interview with the defendant from phase II of a trial on the grounds that the psychiatrist did not comply with the dictates of *Miranda*.

Assuming, *arguendo*, that *Miranda* is applicable in the case at bar, we will consider Lindh's argument that Dr. Roberts failed to scrupulously honor his purported assertion of his right to remain silent when he indicated he did not want to discuss the details of the shootings.

A defendant's exercise of his right to silence must be "scrupulously honored," *State v. Hartwig*, 123 Wis.2d 278, 284, 366 N.W.2d 866 (1985), citing *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence. *Id.*

These principles notwithstanding, it is clear that Lindh never exercised or invoked his right to silence during his interview with Dr. Roberts on the day of the shooting. Lindh did not assert that he did not want to talk with Dr. Roberts. Never did he say that he did not want to answer additional questions. He did not ask Dr. Roberts to end the interview or to go away. He said only that he did not want to discuss the details of the shootings. That, standing alone, is not an invocation of the right to silence. *See e.g., State v. Koput*, 134 Wis.2d 195, 202, 396 N.W.2d 773 (Ct.App.1986), *rev'd on other grounds*, 142 Wis.2d 370, 418 N.W.2d 804 (1988); *People v. Galimanis*, 765 P.2d 644 (Colo.Ct.App.1988), *cert. granted*, 783 P.2d 838 (Colo.1989); *People v. Brockington*, 126 A.D.2d 655, 511 N.Y.S.2d 84, 86 (1987).

We conclude that, even if Lindh arguably did invoke his right to remain silent, Dr. Roberts scrupulously honored that right. Whether the questioner used "improper persuasive tactics" or "overbearing or coercive tactics" is determinative. *State v. Turner*, 136 Wis.2d 333, 357-60, 401 N.W.2d 827 (1987). Here, such tactics were not used.

Thus, we hold that the trial court did not abuse its discretion or otherwise err either in excluding the evidence proffered by Lindh on cross-examination or in

admitting the testimony of Dr. Roberts pertaining to his interview of Lindh on the evening of the shootings. Because of our holdings in this case, we need not consider the question of harmless error with respect to either issue.

The decision of the court of appeals is reversed.

BABLITCH, J., withdrew from participation.

SHIRLEY S. ABRAHAMSON, Justice (dissenting).

I agree with the unanimous decision of the court of appeals that the circuit court committed prejudicial error in completely barring the defendant from cross-examining the psychiatrist-witness about a pending investigation into the witness's alleged criminal misconduct to show bias.[1]

The majority opinion holds that the test to determine whether defense counsel may cross-examine a state's witness about alleged criminal misconduct to show the witness's bias is whether a jury could find a "logical connection" between the criminal investigation of the witness and the district attorney's office on whose behalf the witness was testifying. The majority then concludes

[1] Cross-examination directed toward revealing biases, prejudices, or ulterior motives of a witness – that is, an interest of the witness that may relate directly to issues or personalities in the case at hand – is a particular attack on the credibility of the witness. The proper standard for the test of relevancy in cross-examination is whether the evidence will be useful to the jury in appraising the credibility of the witness. *Rogers v. State*, 93 Wis.2d 682, 689, 287 N.W.2d 774 (1980).

that the circuit court did not err in excluding the evidence, because "the relationship between the Dane county district attorney's office and [the witness] which would be necessary to suggest bias, interest or motive simply did not exist." Majority op. at 177.[2]

This test does not conform to the test set forth in earlier cases. This court and the United States Supreme Court have concluded that "a defendant, as an ingredient of meaningful cross-examination, must have the right to explore the subjective motives for the witness' testimony."[3] Evidence is relevant to the issue of bias in this

[2] The majority asserts that there was no evidence of any investigation of Dr. Roberts during the pendency of the defendant's case. Majority op. at 178. I believe that for the purposes of this appeal, the fact that allegations of professional misconduct by Dr. Roberts had been referred to a special prosecutor is sufficient evidence that some kind of investigation would follow.

[3] *State v. Lenarchick*, 74 Wis.2d 425, 448, 247 N.W.2d 80 (1976) (Emphasis added).

> According to the United States Supreme Court, evidence relating to bias on cross-examination is relevant if a jury might reasonably find that the evidence "furnished the [state's] witness a motive for favoring the prosecution in his testimony." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).
>
> The circuit court must recognize that a jury need not accept the witness's denial about bias. Cross-examination should be permitted "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974).

case if it tends to prove that the witness believed that he might be aided or harmed by testifying in a particular way. The focus of the circuit court's inquiry should be on the witness's state of mind.

Because I believe the majority opinion uses an incorrect standard and reaches an incorrect decision, I dissent.

I.

I believe that the circuit court in this case had to apply the following analysis to determine the relevance of evidence proffered on cross-examination to show a witness's bias: Does the proposed cross-examination support a reasonable inference that the witness believed he might benefit if he testified in favor of the state's position, or he might be disadvantaged if he testified against the state's position?

The party asserting bias need not prove that the witness received promises from the state or would in fact benefit from or be harmed by giving certain testimony. It is enough if the witness believes he or she has a self-interest in the testimony.[4]

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[4] In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), for example, the Supreme Court held that it was error to bar evidence on cross-examination that a state witness was on juvenile probation. The adverse party asserting bias in that case wished to show that the witness may have feared that his probation would be revoked and feared that he might be a suspect in the investigation. There was no suggestion that actual threats of revocation of probation had been made to the witness or that the witness was a suspect.

Even if the witness's beliefs were "absurd," the adverse party has a right and a duty to explore the witness's motives. We explained this obligation in *State v. Lenarchick*, 74 Wis.2d 425, 447, 247 N.W.2d 80 (1976), as follows:

> Although no promises had been made to [the witness], he may well have been testifying favorably to the state in the hope and expectation that the state would reward him by dropping or reducing pending charges. Even though that expectation were absurd, defense counsel had the right and duty to explore the witness' motives.

I conclude that the majority opinion mistakenly adopts a new test to determine the relevance of evidence to show a witness's bias that deviates from the test this court and the United States Supreme Court have established.

II.

Applying the test this court and the United States Supreme Court have used to determine the relevance of evidence proffered to show bias, I conclude that the circuit court erred in barring cross-examination on the issue of bias in this case.

In reviewing the circuit court's decision about the scope of cross-examination to show bias, an appellate court must consider (1) that an adverse party is allowed

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See also State v. Balistreri, 106 Wis.2d 741, 753, 317 N.W.2d 493 (1982).

great latitude regarding the subject and scope of the inquiry to show bias; (2) that the determination of the relevancy of the line of questioning proffered to establish bias is within the discretion of the circuit court;[5] and (3) that it is error for a circuit court to bar an accused from presenting all facts from which a jury might reasonably infer bias of a prosecution witness.[6]

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[5] In *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981), the court stated the method for reviewing a circuit court's discretionary determination:

> A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning. The record here demonstrates beyond doubt that the trial court in this case failed to articulate and use the discretionary standards which the legislature has set as guidelines for determining an award of maintenance and failed to set forth the facts upon which it relied.

[6] *State v. Lenarchick*, 74 Wis.2d 425, 446-448, 247 N.W.2d 80 (1976).

The circuit court in this case determined that the evidence proffered was "totally irrelevant and immaterial" to the issues of motive, interest or bias.[7] The state argues that on a sliding scale of possible bias, the defendant's theory of bias in this case is too weak to allow the defendant to cross-examine on this subject.

Both the majority opinion and the circuit court apparently base their determination of lack of relevance on two factors and reason as follows:

1. Dr. Roberts learned two facts simultaneously. He learned that the state might investigate allegations of criminal conduct his patients made against him. He also learned that a special prosecutor unconnected with the Dane County district attorney's office would be in charge of the matter. Knowing that the Dane County district attorney was prosecuting the defendant in this case and another district attorney's office was in charge of a possible investigation of him for criminal charges, Dr. Roberts could not possibly think that his testimony benefitting the Dane County district attorney's case against the defendant could influence the outcome of his own potential criminal case.

2. Criminal charges were not filed against Dr. Roberts during the pendency of the defendant's case. Thus during the pendency of the defendant's case,

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[7] The circuit court stated: "And I think it's fair to say that, no matter what [Dr. Roberts does] for the Dane County district attorney's office, [Dr. Roberts] would not be able to influence any result, as a result of [the special prosecutor's] investigation or any judge that might ultimately hear it, should there be any charges filed."

because any prosecution of Dr. Roberts was "merely a possibility, there was no reasonable basis to believe that Dr. Roberts would color his report. . . . " or testimony. Majority op. at 178. The majority intimates that no bias can be shown unless criminal charges are filed or there is proof of actual negotiation between the witness and the state regarding specific pending charges.

This reasoning is, I believe, flawed. The majority's reliance upon the special prosecutor's being in the Milwaukee County district attorney's office and not in the Dane County district attorney's office lends little support for the majority's conclusion. Even though the circuit court or the majority believes that the presence of two autonomous district attorney offices guarantees that the one would not influence the other, Dr. Roberts might have believed otherwise. Dr. Roberts would know that his testimony in this high profile case would be an open, public record that the special prosecutor might very well hear or read about.

The record shows that Dr. Roberts learned of his expanding difficulties with various authorities after his January interview with the defendant and before he filed his report in August. He learned about investigations by the University Hospital and the State Medical Examining Board and that allegations against him had been referred to the State Justice Department and the district attorney's office. Nothing in the record indicates that Dr. Roberts had formed an opinion regarding the defendant's mental state after the first interview. Indeed, Dr. Roberts interviewed the defendant in June and again in August shortly before trial in September, 1988.

A jury could infer that Dr. Roberts may have felt intensified internal pressure over the entire period to shade his testimony in favor of the state. A jury could infer that Dr. Roberts believed, however unwarranted the belief, that if he testified favorably for the state in the defendant's case, the special prosecutor might be more favorably disposed to drop the investigation; or to investigate the allegations less vigorously; or to show leniency in any charges filed or in a plea agreement or in a recommendation on sentencing.

Neither case law nor logic supports the majority's view that formal charges must be filed before an investigation into criminal behavior is relevant to the issue of bias. The cases stand for the proposition that "when a witness is subject to the coercive power of the state and can also be the object of its leniency" an adverse party must have the opportunity to explore the subjective motives for the witness's testimony. *State v. Lenarchick*, 74 Wis.2d 425, 447-448, 247 N.W.2d 80 (1976).[8]

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[8] See *United States v. Garrett*, 542 F.2d 23 (6th Cir.1976), holding it was abuse of discretion for the trial court to exclude evidence that the government's witness in a drug case had been suspended from the police force because he was suspected for using hard drugs himself and had refused to submit to a urine test. The court of appeals concluded that a jury may have inferred that the witness looked upon a successful prosecution as a means of having his suspension lifted.

See also *State v. Chesnut*, 621 P.2d 1228, 1233 (Utah 1980), *disapproved on other grounds, State v. Crick*, 675 P.2d 527, 531 (Utah 1983) ("the mere possibility of future criminal charges is a sufficient basis to explore the motives of the witness on cross-examination [and to] place his apprehensions thereof before the jury").

That charges had not been filed against Dr. Roberts strengthens rather than weakens the defendant's theory of bias.[9] Dr. Roberts rendered his opinion on the defendant's mental capacity when he did not know what the state would do to him. The jury could reasonably infer that as long as the special prosecutor deferred action on Dr. Roberts's case, Dr. Roberts could hope – even though that hope may have been unrealistic – that he might help his own cause by testifying favorably for the state's position in the defendant's case.

In this case the range of cross-examination to show bias should be even broader than in other cases. In many areas, such as fingerprints, ballistics, and forensic chemistry, expert testimony opinions are formed from "hard" data, knowledge or principles. The opportunity for the expert opinion to be influenced by bias is limited. Psychiatry, in contrast, is a field based largely on "soft" data or knowledge. Under these circumstances the possibility increases that the psychiatrist's findings, opinions, and presentations may be slanted, consciously or unconsciously, by any biases. J. Ziskin and D. Faust, *Coping with Psychiatric and Psychological Testimony* 45 (4th ed. 1988).

I conclude that under the circumstances of this case the circuit court abused its discretion in ruling that the

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[9] The fact that the charges against Dr. Roberts were unproven might be important to the defendants' theory of admissibility based on challenging Dr. Roberts's credibility. Since I conclude that the evidence was admissible to show bias, I do not reach that issue.

evidence of the criminal investigation involving Dr. Roberts was irrelevant to the defendant's theory of bias.[10]

III.

Relevant evidence, of course, may be barred if its probative value is outweighed by unfair prejudice. The circuit court may exclude relevant evidence if it has "a tendency to influence the outcome by improper means." *State v. Baldwin*, 101 Wis.2d 441, 455, 304 N.W.2d 742 (1981). The state argues that unproved allegations of Dr. Roberts's sexual misconduct with patients is a "highly emotionally charged" issue that would distract the jury.

Dr. Roberts's testimony was of great importance to the state. The sole issue in the second phase of the trial was the defendant's mental state. Both the state and the defendant relied on expert witnesses to prove the defendant's mental state. Dr. Roberts was the only expert witness who saw the defendant at the critical time, the day of the offense. The jury's responsibility was to "weigh the opinion of one expert against that of another . . . consider[ing] the relative qualifications and credibility of the expert witnesses." Wis JI-Criminal 200A (Rel. No. 10 – 11/83).[11]

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[10] Because I believe the circuit court abused its discretion in refusing to admit the evidence of bias on cross-examination, I do not reach the defendant's constitutional claim based on the confrontation clause. I note, however, that conforming to the Wisconsin Rules of Evidence may not satisfy constitutional requirements.

[11] The members of the jury are always the "sole judges of the credibility of the witnesses and the weight and credit to be

The evidence of Dr. Roberts's being an object of an investigation for criminal wrongdoing was probative of bias. Any prejudice or distraction caused by giving this information to the jury could have been circumscribed by restricting the scope of the defendant's cross-examination.[12] The nature of the allegations made by Dr. Roberts's patients was irrelevant to the defendant's theory of bias. The relevant information for the jury was the seriousness of the allegations, the referral of the allegations by the hospital to the state for possible criminal prosecution, and the effect on Dr. Roberts's professional career, livelihood, reputation and personal life should he be charged with or convicted of these charges.

Given an adverse party's great latitude regarding the subject and scope of an inquiry to show the witness's bias, the importance of Dr. Roberts's testimony, and the circuit court's power to curtail any undue prejudice to the state by limiting the cross-examination, the circuit court abused its discretion in barring all the proffered evidence, concluding that prejudice to the state outweighed the probative value of the evidence in this case.

IV.

I further conclude that the error barring the evidence was not harmless. Dr. Roberts was the state's primary psychiatric witness. He emphasized in his testimony the

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given to their testimony." Wis JI-Criminal 300 (Rel. No. 25 – 6/90)

[12] The circuit court never considered limiting instructions, because the court ruled the evidence was not relevant.

value of having interviewed the defendant on the day of the shooting – an advantage the other psychiatric witnesses could not claim. Despite the defendant's having the burden of proof on the mental disease or defect issue in the second half of the bifurcated trial, I conclude that prohibition of the bias evidence on cross-examination of Dr. Roberts undermines confidence in the outcome of this case. State v. Dyess, 124 Wis.2d 525, 544-45, 370 N.W.2d 222 (1985).

V.

Finally, I register my disagreement with the majority's conclusion that the *Miranda* rule does not apply to Dr. Roberts's initial interview of the defendant. The United States Supreme Court has not yet decided a case which discusses the application of *Miranda* in situations such as the one presented in this case, namely, where the interview takes place before the accused has been charged or has raised a defense of insanity.[13]

The court should not reach out and decide this issue which is not presented by the facts of the case. The court of appeals correctly determined, I believe, that Dr. Roberts's *Miranda* warnings to the defendant were adequate and that the defendant's rights were honored. Although Dr. Roberts failed to inform the defendant that

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[13] The majority's reliance on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), for its conclusion that *Miranda* does not apply to Dr. Roberts's initial interview of the defendant is misplaced. See Comment, Fifth Amendment Limitations on the Use of Police Testimony to Rebut the Insanity Defense, 58 U.Chi.L.Rev. 359 (1991).

a lawyer would be provided to him at state expense, if necessary, a Dane County detective gave the defendant his full *Miranda* rights less than an hour before the interview with Dr. Roberts.

For the reasons set forth, I would affirm the decision of the court of appeals. Like the court of appeals, I would remand for a new trial on the defendant's plea of not guilty by reason of mental disease or defect.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

-vs-

Case No. 92-C-690

JAMES P. MURPHY,

Respondent.

DECISION AND ORDER

This matter comes before the Court on Aaron Lindh's ("Lindh") petition for a writ of habeas corpus under 28 U.S.C. § 2254. By way of procedural background, the Court first notes that this matter was initially pending before another branch of this District Court, at which time Lindh filed a motion to compel the State to produce the transcripts of the underlying state trial court proceedings. The State opposed this motion on the grounds that the Court should first address a preliminary constitutional issue raised by Lindh's petition, *i.e.*, whether the Sixth Amendment's right to confrontation applies during the insanity phase of a bifurcated criminal proceeding. This issue, the State argued, did not require reference to the voluminous transcript and, if decided in the State's favor, would obviate the need to reproduce the same. The matter was subsequently transferred to this Court. After a preliminary review of the pleadings, the Court bifurcated the issue in the manner suggested, primarily because Lindh had no objection to the State's preference to proceed with the constitutional issue first.

The Court recently reviewed this file with an eye towards deciding the constitutional issue briefed by the parties. During the course of this review, however, it became clear to the Court that proceeding in the manner requested by the State was a mistake. Indeed, after a thorough review of the decisions from the Wisconsin Court of Appeals and Wisconsin Supreme Court in this case, it is clear that those courts, along with the trial court, operated under the assumption that the Sixth Amendment's right to confrontation applied during the insanity phase of Lindh's trial. Ultimately, however, the Supreme Court affirmed the trial court's decision denying the cross-examination at issue on *relevancy* – not constitutional – grounds. The Supreme Court did so after a thorough review of the evidence and the voir dire relied upon by the trial court, evidence which is already before the Court through respondent's answer herein. Thus, if the state courts were correct in their determination of the relevancy issue, the constitutional issue need not be reached. The Court therefore discusses the relevancy issue first.

I. MOTION FOR TRANSCRIPTS

Lindh's motion to produce the full transcript of the trial court proceedings was tabled on the assumption that the Court was going to address the constitutional issue first. Now that the Court has decided to proceed differently, the motion should be addressed. The Court denies the motion. Full transcripts are not always, or even often, necessary to enable a federal court to decide a § 2254 habeas petition. Here, the question involved is whether the proposed cross-examination of a psychiatric doctor

who examined Lindh was relevant as showing potential bias on the part of the doctor. When Lindh first learned of the potential for bias, his counsel submitted a list of factual questions to the assistant district attorney, seeking detailed information as to the facts supporting the allegations of bias. The Court has a copy of those questions. In response, the assistant district attorney provided detailed answers to all of the questions submitted: The Court has a copy of those answers. During hearings connected with the trial, the State moved to exclude any cross-examination regarding the facts and circumstances of the alleged bias on relevancy grounds, arguing that the facts established by the State in response to Lindh's written questions establishes that the doctor at issue could not possibly have been biased in the manner alleged by Lindh. The trial court first agreed with the State, but then later allowed the parties to voir dire the doctor, outside of the presence of the jury, regarding the facts and circumstances supporting the claims of bias. The Court has a copy of the voir dire transcript. The trial court found, and the Supreme Court agreed, that the testimony brought out on voir dire, which included cross-examination by Lindh's counsel, fully confirmed the facts detailed in the State's responses to Lindh's written questions. Lindh himself acknowledges that the "voir dire disclosed no material variance between Dr. Roberts own responses and Prosecutor Burr's written answers to the defense's Specific Demand for Exculpatory Evidence." (Respondent's Answer, Ex. B at 16, fn. 3.) The trial court then re-affirmed its legal conclusion that the undisputed facts did not give rise to a reasonable inference of bias, and therefore

denied the proffered cross-examination on relevancy grounds.

Therefore, it appears to the Court that the facts underlying Lindh's petition are undisputed and contained in Lindh's written questions, the State's written responses thereto, the voir dire transcript, and the Wisconsin Supreme Court's discussion of the issues in its written opinion, found at *State v. Lindh*, 161 Wis.2d 324 (Wis. 1991). All of the foregoing are already before the Court by way of the respondent's answer. The question before the Court, therefore, is simply the legal question of whether those facts were relevant, *i.e.*, whether they gave rise to a reasonable inference of bias, such that a reasonable jury could have disregarded Roberts' testimony as biased and thereby reached a different verdict on the question of insanity. The Court need not have any other portions of the record before it to make that determination. Nor is a traverse necessary from the petitioner. Indeed, on this issue, the Court already has the benefit of the briefs submitted by petitioner to the Wisconsin Court of Appeals and Wisconsin Supreme Court, as well as the decisions from those courts, including the Court of Appeals' decision, which agreed with petitioner's argument.

II. RELEVANCY

A. Facts.

In the underlying proceedings, Lindh was charged with, *inter alia*, two counts of first degree murder and one count of attempted first degree murder. *Id.* The day of the

shootings, and shortly after Lindh was taken into custody, Dane County Assistant District Attorney John Burr ("Burr") retained Dr. Leigh Roberts ("Roberts"), a forensic psychiatrist, anticipating that Lindh or others might raise questions concerning Lindh's mental state during the shootings at issue. *Id.*, 161 Wis.2d at 335. That same night, January 15, 1988, Roberts interviewed Lindh in the hospital for purposes of assessing his mental state. *Id.*, at 336. The interview consisted of two sessions of questioning separated by a single 12-minute break. *Id.*, at 336-38.

On February 26, 1988, Lindh was arraigned and entered pleas of not guilty and not guilty by reason of mental disease. *Id.*, at 338. Roberts was appointed by the Court as one of the doctors who were to examine Lindh on behalf of the State. *Id.* Shortly thereafter, on March 8, 1988, Roberts became aware that the University of Wisconsin Hospital was investigating an allegation that he had engaged in sexual misconduct with a female patient. *Id.* At the time, Roberts was generally aware that, if proven true, such allegations could subject him to criminal penalties under a state statute, and he presumed that any such prosecution, if it came to that, would occur in Dane County, where the allegations were made, and would be prosecuted by someone in the Dane County District Attorney's office. *Id.* Although he admits having this general knowledge, Roberts did not give any particularized thought to the possibility of such a prosecution by the Dane County district attorneys. *Id.* Sometime in May, 1988, Roberts became aware that the Medical Examining Board was also investigating allegations of sexual misconduct by Roberts with three female patients. *Id.*, at 339. Roberts learned of this investigation when he

received a request for records from the examining board. *Id.*

On June 22, 1988, Roberts interviewed Lindh again, this time at the Dane County jail. *Id.* The next day, unbeknownst to Roberts, University of Wisconsin Hospital attorneys met with the Dane County District Attorney and referred to him the allegations against Roberts. *Id.* At that meeting, the District Attorney informed hospital officials that he would immediately seek to transfer the matter to a special prosecutor because of the potential for a conflict of interest between his office and Dr. Roberts. *Id.* On June 28 or 29, 1988, the Dane County Circuit Court appointed the Milwaukee County District Attorney's office as special prosecutor for the Roberts matter. *Id.* At this time, Roberts had no knowledge that charges had been referred to the Dane County District Attorney or that a special prosecutor had been appointed to investigate those charges. *Id.* No member or representative of the Dane County District Attorney's office, nor any police officer, ever contacted Roberts or his counsel concerning these allegations. *Id.* Nor did anyone from the Dane County District Attorney's office ever make a formal or informal decision as to whether a formal investigation should proceed, or ever contact the special prosecutor regarding the actual investigation. *Id.* at 339-40.

On July 8, 1988, Roberts became aware, for the first time, through his attorney, that allegations had been referred to the Dane County District Attorney's office. *Id.*, at 339. At the same time, Roberts also learned that a special prosecutor from outside of Dane County had already been appointed to investigate the allegations. *Id.*, at 339-40. On August 17, 1988 Roberts submitted his

report concluding that Lindh was not suffering from a mental disease or defect at the time of the shootings. *Id.*, at 340. On August 22, 1988, Roberts interviewed Lindh for the last time. *Id.*

On September 7, 1988, Lindh submitted his aforementioned discovery demand upon the State seeking detailed information as to the misconduct allegations against Dr. Roberts and the timing and substance of Roberts knowledge regarding the same. *Id.* The State promptly responded, and Lindh acknowledged that the State fully complied with his discovery request. *Id.*, at 340-41. In a hearing on the State's subsequent motion in limine, the trial court heard oral argument on the same and concluded that the proffered evidence – consisting of the State's responses to Lindh's discovery questions – was irrelevant. *Id.*, at 341-43. The trial court reasoned that in light of the fact that the allegations against Dr. Roberts were almost instantaneously transferred out of the Dane County District Attorney's office to the special prosecutor, there was no possibility of bias, motive or interest on the part of Dr. Roberts. *Id.* at 343. The trial court also concluded that, even if relevant, the probative value of the evidence had to be weighed against the risk of "unfair prejudice", and found that the latter outweighed the former, providing another ground for precluding the cross-examination at issue. *Id.* At the same time, however, as indicated earlier, the trial court allowed Lindh's counsel to voir dire Dr. Roberts outside the presence of the jury, which voir dire essentially confirmed and reiterated the information contained in the state's response to Lindh's discovery questions. *Id.*, at 343-44. For that reason, the

trial court found no reason to alter its prior ruling granting the State's motion in limine. *Id.*

On appeal, the Wisconsin Court of Appeals reversed the trial court's ruling regarding the relevancy of the proffered cross-examination and the risk of unfair prejudice presented by the same. *State v. Lindh*, 156 Wis.2d 768 (Wis.Ct.App. 1990). The Wisconsin Supreme Court granted review of the appellate court's decision and reversed the same, finding that the trial court did not abuse its discretion in finding the proffered evidence irrelevant. *Lindh*, 161 Wis.2d at 345-49. This Court agrees.

B. Analysis.

As The Wisconsin Supreme Court explained, "[t]he confrontation clause of the Sixth Amendment of the United States constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him' " *Lindh*, 161 Wis.2d at 345-46. More specifically, "[t]he United States Constitution protects the opportunity to cross-examine a witness with regard to bias and motivation to lie." *Bell v. Coughlin*, 778 F. Supp. 164, 174 (S.D.N.Y. 1991), *aff'd*, 17 F.3d 390 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 2685 (1994). Indeed, " 'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' " *Lindh*, 161 Wis.2d at 346. However, the U.S. Supreme Court has also ruled that the right of cross-examine [sic] is not unlimited:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986). Thus it is said that "[t]he confrontation clause 'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.' " *Id.*, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294 (1985). "Furthermore, the denial of a defendant's opportunity to impeach a witness for bias and motivation to lie, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis." *Bell*, 778 F. Supp. at 174.

Under the foregoing principles, the question becomes whether or not the jury might have reasonably assessed Dr. Roberts' credibility and opinion differently had Lindh's defense counsel been permitted to pursue the line of questioning regarding the allegations of sexual misconduct. *See Bell*, 778 F. Supp. at 174. If the evidence Lindh hoped to bring out could not reasonably support the conclusion that Roberts was biased against Lindh or had an ulterior motive to render an opinion favorable to the prosecution's case, the Confrontation Clause was not violated. As stated earlier, the evidence Lindh hoped to bring out consisted of the facts contained in Lindh's voir dire of Roberts and the State's answers to Lindh's written discovery demands. That evidence clearly shows that, by the time Roberts was aware that the allegations of sexual misconduct had been referred to the District Attorney's

office, the matter had already been transferred to a special prosecutor outside of Dane County. At that point, because the matter was already out of the hands of Dane County authorities, Roberts had no reason to believe that he would obtain some form of leniency in exchange for an opinion favorable to the prosecution in the Lindh case. The Court agrees wholeheartedly with the analysis of the Wisconsin Supreme Court in this regard:

> Clearly, up until July 8, 1988, there was no reasonable possibility for bias, motive or interest on the part of Dr. Roberts because until that date he did not know that any allegations had been referred to the Dane county district attorney's office. Because Dr. Roberts became aware of the immediate transfer of the matter to the special prosecutor at the same time he had no reason to believe after July 8, 1988, that the Dane county district attorney's office would be in a position to prosecute him and thus possibly favor him in exchange for his testimony. Dane county was not in a position to make any "deals," reduce any charges, or even make any recommendation as to any criminal investigation or prosecution against Dr. Roberts and Dr. Roberts knew it. He therefore had no reason to favor the prosecutor in the instant case by testifying or giving a report favorable to him.
>
> The relationship between the Dane county district attorney's office and Dr. Roberts which would be necessary to suggest bias, interest or motive simply did not exist. The disclosure provided by the prospector upon the request of the defense and the voir dire of Dr. Roberts unequivocally showed the same thing. There is no reason whatsoever to conclude that there was

> fertile ground for even the seed of a "deal" to be sewn and to germinate under those circumstances. To suggest that Dr. Roberts' testimony would be influenced in favor of the prosecution under these circumstances amounts to mere speculation. There being no nexus between the future criminal investigation and prosecution of Dr. Roberts, if any were to be undertaken, and the Dane county district attorney's office, a jury could not reasonably find a logical connection between the two, because none existed.

Lindh, 161 Wis.2d at 350-51. Because the jury's assessment of Roberts' testimony could not reasonably have been altered by the excluded evidence, the trial court did not violate petitioner's 6th Amendment rights.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Lindh's petition is denied and the case dismissed.

Dated at Milwaukee, Wisconsin, this 4th day of October, 1995.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92-C-690

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

✔ **Decision by Court.** This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Aaron Lindh's 28 United States Code, Section 2254 Petition for a Writ of Habeas Corpus is DENIED. This action is hereby DISMISSED.

October 4, 1995
Date

/s/ SOFRON B. NEDILSKY
Clerk

/s/ Linda M. ZR
(By) Deputy Clerk

Aaron LINDH, Petitioner-Appeliant,

v.

James P. MURPHY, Warden, Respondent-Appellee.

No. 95-3608.

United States Court of Appeals, Seventh Circuit.

Argued April 9, 1996.

Reargued En Banc June 17, 1996.

Decided Sept. 12, 1996.

Before POSNER, Chief Judge, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

In January 1988 Aaron Lindh marched into the City-County Building of Madison, Wisconsin, and shot three strangers for no apparent reason. Two died. Lindh pleaded guilty to carrying and using a firearm in a public building; a jury convicted him of two murders and one attempted murder. During the second phase of a bifurcated proceeding, Lindh argued that he was insane at the time of the shootings, which under Wisconsin law would alter the place of his confinement (from a prison to a prison-hospital) and entitle him to release if at some future time he should be deemed "recovered." But the jury found that Lindh did not have a mental disease when he pulled the trigger, and the judge sentenced him to life plus 35 years in prison.

Lindh's principal contention on appeal was that the judge unduly restricted his cross-examination of Dr. Leigh Roberts, a psychiatrist who interviewed him on the day of the shootings (and several times thereafter) and testified for the prosecution during the second phase of the trial. During March 1988 Roberts learned that he was under investigation for engaging in improper sexual conduct with a female patient; in May 1988 Roberts learned that the Medical Examining Board was looking into allegations made by three female patients. By the time of trial in September 1988 a criminal investigation was ongoing – conducted by the Milwaukee County District Attorney, acting as a special prosecutor after the Dane County District Attorney (whose jurisdiction includes Madison) recused himself. Lindh's attorney sought to explore the allegations made against Roberts, contending that the pending investigation would give Roberts a reason to slant his testimony in the prosecution's favor. Lindh did not argue that Roberts had entered into discussions with the prosecutor about the sexual misconduct allegations; any plea agreement or negotiations in progress would have been subjects of cross-examination under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Instead Lindh argued that even if the Dane County prosecutor could not provide a quid pro quo by forgoing charges or reducing their severity, he might put in a good word with the Milwaukee prosecutor; and whether or not lenity was in the cards, Roberts might *believe* that he had something to gain from helping to convict Lindh, which could color his analysis and testimony. Lindh argued that both state law and the Confrontation Clause of the Sixth Amendment, applied to the

states by the due process clause of the Fourteenth, entitled him to cross-examine Roberts about all potential sources of bias. See *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The trial judge foreclosed inquiry into this subject (although he permitted extensive cross-examination on other matters), the court of appeals reversed, *State v. Lindh*, 156 Wis.2d 768, 457 N.W.2d 564 (Wis.App.1990), and the Supreme Court of Wisconsin reversed in turn, reinstating the sentences, *State v. Lindh*, 161 Wis.2d 324, 468 N.W.2d 168 (1991). The state's highest court concluded that the possibility of bias was so remote, given the appointment of a special prosecutor, and the prospect of diverting attention to the sexual encounters (a subject of no relevance to Lindh's sanity) sufficiently great, that the trial judge did not abuse the discretion he possessed under both state and federal law. Justice Abrahamson dissented on state-law grounds. 468 N.W.2d at 185-89. Lindh then commenced a collateral attack in federal court. The district court denied the petition, writing that it "agrees wholeheartedly with the analysis of" the state's Supreme Court. Lindh appealed to this court.

Fifteen days after a panel heard oral argument, the President signed the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214. Section 104 of the new statute amends 28 U.S.C. § 2254, the law under which Lindh seeks relief. Unaffected by the 1996 Act, § 2254(a) provides that a writ of habeas corpus

may issue "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." It does not further elaborate. Federal courts exercising their authority under § 2254(a) disregarded the state courts' legal conclusions and reached independent judgments on issues presented to them. *Brown v. Allen*, 344 U.S. 443, 458, 73 S.Ct. 397, 407-08, 97 L.Ed. 469 (1953). Section 104(2) of the 1996 Act redesignates the former § 2254(d), which deals with state courts' findings of fact, as § 2254(e); § 104(3) of the 1996 Act, 110 Stat. 1219, adds a new § 2254(d) that for the first time specifies the appropriate treatment of legal determinations by state courts:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

We set this case for reargument before the full court in order to decide whether the new provision applies to pending cases and, if it does, how it affects them. We invited and received supplemental briefs from the parties, and we have had the benefit of briefs from the

American Bar Association and a group of former federal judges as *amici curiae*.

I

Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), lays out a sequence of issues. First we must decide whether Congress has decided to which cases a new law applies; if it has, the only task is to follow the statute. If Congress has not provided one way or the other, we must apply the law in force at the time of decision – which is to say, the new § 2254(d) – unless "the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at ___, 114 S.Ct. at 1499. But what is a "new legal consequence"? *Landgraf* says that not every change in outcome counts; it matters whether the party adversely affected by the change has legitimate reliance interests in the operation of the former law.

A

Has Congress answered the question at hand? Not directly. Section 104 of the 1996 Act lacks an effective-date provision. Lindh contends that Congress addressed the subject indirectly, by providing that the new Chapter 154 of Title 28 (28 U.S.C. §§ 2261-66), captioned Special Habeas Corpus Procedures in Capital Cases and contained in § 107(a) of the 1996 Act, applies "to cases pending on or after the date of enactment of this Act." Section 107(c), 110 Stat. 1226. This establishes, Lindh submits, that §§ 101 to 106 of the statute do *not* apply to pending cases.

"Establishes" is too strong a word. Sections 101 to 106 amend Chapter 153 of Title 28. Nothing in the 1996 Act provides one way or another for the temporal extent of the changes. Do they govern collateral attacks arising out of crimes committed after April 24, 1996? Convictions after that date? Appellate decisions after that date? Collateral attacks filed after that date? The statute is silent. Congress addressed those issues for Chapter 154, but not Chapter 153. There is at most a negative implication. Should we draw it? A competing inference is that Congress could not agree on an effective-date provision for the amendments to Chapter 153, leaving the subject to judicial resolution. Perhaps instead Congress overlooked the subject when drafting §§ 101-106 (the changes to Chapter 153 and the new Chapter 154 originated in different Houses of Congress at different times) – or recognized its importance but thought the answer so clear that express provision was unnecessary. Which understanding is superior?

Potential negative implications of effective-date provisions have been urged before, most recently in *Landgraf*. The Civil Rights Act of 1991 provides that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." The Court held that this language "does not even arguably suggest that [the Act] has any application to *conduct* that occurred at an earlier date." 511 U.S. at ___, 114 S.Ct. at 1493 (emphasis added). Two other provisions of the 1991 Act are more explicit. One says that the statute does not apply to a particular ongoing case; the other says that the extension of the civil rights laws to

overseas employers "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Landgraf argued that these two anti-retroactivity provisions established that the rest of the 1991 Act applied to conduct preceding its enactment. Otherwise the two anti-retroactivity provisions would be irrelevant, and courts try to interpret laws to avoid both irrelevance and redundancy. *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1494. The Court conceded this but held nonetheless that the 1991 Act is effectively silent on the question. *Id.* at ___-___, 114 S.Ct. at 1494-96. It was unwilling to draw a negative implication from two provisions that may have been inserted just to make double sure. Although "a majority of the 1991 Congress [may have] favored retroactive application, even the will of the majority does not become law unless it follows the path charted in Article I, § 7, cl. 2 of the Constitution" (511 U.S. at ___, 114 S.Ct. at 1496) – that is, unless it yields a text agreed on by both Houses and signed by the President.

Just so with the 1996 Act. And the argument by negative implication is weaker for the 1996 Act than for the 1991 Act. The Supreme Court's holding in *Landgraf* made two sections of the statute irrelevant. Nothing we could hold, one way or the other, about §§ 101-106 could deprive § 107(c) of independent meaning. True enough, 28 U.S.C. § 2264(b), in Chapter 154, refers to § 2254(d), so § 107(c) requires the application of the amended § 2254(d) to capital cases within the scope of Chapter 154. But we think that Lindh misunderstands Chapter 154 when contending that § 2264(b) has "no function other than to cause certain of the otherwise inapplicable Chapter 153

revisions to apply retroactively" (Supp. Reply Br. 3). Section 2264(a) provides that, when Chapter 154 applies, a court shall consider only "a claim or claims that have been raised and decided on the merits in the State courts" unless failure to raise a claim was caused by one of three identified circumstances. Section 2264(b) adds: "Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it." Why only "subsections (a), (d), and (e) of section 2254"? Surely not because these are to be retroactive, while subsections (b), (c), (f), (g), (h), and (i) are not. If as Lindh believes the only reason to include § 2254(d) in § 2264(b) is to apply it to pending cases, then this must also be the sole reason for referring to § 2254(a) – but § 2254(a) is not amended by the 1996 Act, while many subsections omitted from the list in § 2264(b) were amended or added by the new statute.

Section 2264(b) conveys its meaning only when read together with § 2264(a). Subsections (b) and (c) of § 2254 have been omitted from the list because § 2264(a) *replaces* their rule with one more favorable to the states. Section 2254(b) and (c) codify the exhaustion requirement, which § 2264(a) displaces for Chapter 154 cases. The remaining subsections of § 2254 likewise don't fit the Chapter 154 scheme. For example, § 2254(i), added by the 1996 Act, says that "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 110 Stat. 1219. Chapter 154 addresses this question directly in the new 28 U.S.C. § 2261(e), 110 Stat. 1222, making incorporation of § 2254(i) inapt. Section 2264(b) tells us not "when," but

"which." Lindh's argument therefore misses the mark: this section neither addresses any other section's temporal effectiveness nor is made irrelevant by applying § 2254(d) to pending cases.

Chapter 154 comprises many rules that Congress evidently wanted to apply forthwith no matter what the courts made of §§ 101-106. For example, the new 28 U.S.C. § 2262(a) provides for automatic stays of execution during initial collateral attacks covered by Chapter 154. Prisoners on death row received stays on April 24, 1996, even if courts had denied stays under prior law. Having blocked executions while litigation continues, Congress curtailed the time federal courts may take to act – for example, a court of appeals must decide a capital appeal within 120 days after the filing of the reply brief. 28 U.S.C. § 2266(c)(1)(A). Section 107(c) applies that limit to pending capital cases, a step that serves quite a different function from a decision one way or the other about the application of § 2254(d) to non-capital cases. Congress obviously wanted to *ensure* that both the stays of execution and the time limits – provisions of Chapter 154 without counterparts in Chapter 153 – extended to as many cases as possible. Nothing about that decision has any implications for Chapter 153. We conclude that § 107(c) does not govern the question at hand. Sections 101-106 lack an effective-date provision. We must decide what to do when the legislation is silent.

B

Landgraf reiterates two long-established rules that govern when the legislature is silent: first, courts normally apply the law in force at the time of decision; second, the court does not use the new law if application would be "retroactive." Each side appeals to one of these propositions. Wisconsin contends that § 2254(d) is today's rule of decision and should be applied. Lindh rejoins that § 2254(d) would be "retroactive" to the extent it reduces his chance of prevailing. He also contends that he is entitled to a writ of habeas corpus whether or not § 2254(d) applies, but he uses the possibility of an adverse effect as the definition of retroactivity. As a definition, it will not do – for it would obliterate the first rule, turning it into something like "a court applies the law in force at the time of its decision whenever it is the same as the law in force all along." *Landgraf* was explicit that "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct". 511 U.S. at ___, n. 24, 114 S.Ct. at 1499 n. 24; see also *id.* at ___-___, 114 S.Ct. at 1501-04.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1499 (citation and footnote omitted). Section 2254(d) does not attach new legal consequences to the filing of petitions for habeas corpus, although some other parts of the 1996 Act may do this. We take it that under *Landgraf* a certificate of probable

cause to appeal issued before April 24, 1996, authorizes an appeal, although after April 24 appeal depends on a "certificate of appealability" under § 102 of the 1996 Act (amending 28 U.S.C. § 2253(c)), which not only changes the name but also requires the court to identify the appealable issue. Similarly, a second or successive petition already pending on April 24 does not require prior approval of the court of appeals under § 106 (amending 28 U.S.C. § 2244(b)), see *Williams v. Calderon*, 83 F.3d 281, 285-86 (9th Cir.1996), although the application of the substantive standards in the new § 2244(b) to determine who is eligible for relief is a more difficult question, which the court addresses separately today in *Burris v. Parke*, 95 F.3d 465 (7th Cir.1996).

For a provision such as § 2254(d), which affects the relation between federal and state courts, rather than regulating the details of litigation, the date on which the petition was filed can't be any more important than the date on which the suits were filed in *Landgraf* and *Mojica v. Gannett Co.*, 7 F.3d 552 (7th Cir.1993) (en banc). In *Landgraf* the Court asked whether the Civil Rights Act of 1991 could be applied to employment decisions that preceded the statute. A lawsuit concerning 1990 conduct is governed by 1990 law, no matter when the suit began, *Landgraf* held (as we had held in *Mojica*, 7 F.3d at 558-59). See also *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). The parallel question is whether the 1996 Act may be applied when the crime or state court decision preceded April 24, 1996.

Understandably, Lindh does not argue that, when deciding whether to commit a crime (and, if so, which one), he relied on the availability of the version of § 2254

that was on the books in 1988. Under the Ex Post Facto clauses people charged with crime have powerful, and enforceable, expectations about the legal rules that apply to their conduct. But the 1996 Act does not change any of the rules defining or penalizing crime. Moreover, having lost in the state's judicial system before the amendment, Lindh cannot successfully argue that the change of law affected the judicial process. By any standards, the former version of § 2254 was more favorable to prisoners than the current one, and the prospect of more intensive review by federal courts may have made state courts more attentive to claims under federal law. Lindh wants us to cast a darker light on state judges – to assume that the prospect of plenary federal review made them inattentive to federal rights, because then they could appear tough on crime (to improve reelection prospects) while knowing that the people they confine in prison would eventually be let go. He does not offer any empirical support for believing that state judges wrongfully imprison people to further their own careers, and in Wisconsin judges who proclaim willingness to give defendants extra rights have had no difficulty being retained. See Shirley S. Abrahamson, *The Emergence of State Constitutional Law*, 63 Tex.L.Rev. 1141 (1985). It would not be appropriate to presume that the Justices of the Supreme Court of Wisconsin treated Lindh poorly because they anticipated independent federal review.

Section 2254(d) does not regulate primary conduct. Instead it makes the initial judgment more stable. Do prisoners have legitimate expectations about the scope of collateral review? This is a question the Supreme Court addressed in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct.

838, 122 L.Ed.2d 180 (1993). A prisoner called his lawyer ineffective for failing to take full advantage of an appellate opinion that was overruled after the prisoner commenced his collateral attack. The Supreme Court held that the prisoner could not rely on the overruled decision (or obtain relief because his lawyer failed to do so, when he could), even though its disappearance reversed the outcome of his case. The Court's discussion is worth quoting:

> The dissent contends that this holding is inconsistent with the retroactivity rule announced in *Teague v. Lane*, 489 U.S. 288, 310 [109 S.Ct. 1060, 1075, 103 L.Ed.2d 334] (1989), but we think otherwise. *Teague* stands for the proposition that new constitutional rules of criminal procedure will not be announced or applied on collateral review. As the dissent acknowledges, this retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on "the constitutional standards that prevailed at the time the original proceedings took place." "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 [110 S.Ct. 1212, 1217, 108 L.Ed.2d 347] (1990).

A federal habeas petitioner has no interest in the finality of the state court judgment under which he is incarcerated: indeed, the very purpose of his habeas petition is to overturn that judgment. Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a

> basis for his actions that corresponds to the State's interest described in the quotation from *Butler, supra*. The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it. *Cessante ratione legis, cessat et ipsa lex.*

506 U.S. at 372-73, 113 S.Ct. at 844 (citations omitted). In other words, legal changes that reduce the willingness of federal courts to set aside judgments presumptively apply to existing judgments.

This is the historical practice. The Supreme Court consistently applies statutory changes in the law of collateral attack to pending cases, and perforce to newly filed cases that seek relief from judgments entered before the statute's enactment. In *Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), the Court decided a case under the 1996 Act's standards, even though the conviction preceded the amendments. (The petition for habeas corpus in *Felker* was filed after April 24, 1996, but we have already explained why the date of the petition cannot be dispositive.) Thirty years ago Congress made extensive amendments to Chapter 153, which the Court applied to cases under review without so much as remarking on the date of enactment. *Smith v. Yeager*, 393 U.S. 122, 124-25, 89 S.Ct. 277, 278-79, 21 L.Ed.2d 246 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968). Earlier amendments to the rules of collateral attack likewise were brought to bear in pending cases. *Gusik v. Schilder*, 340 U.S. 128, 131-33 & n. 4, 71 S.Ct. 149, 151-52 & n. 4, 95 L.Ed. 146 (1950), implements the exhaustion requirement introduced by the 1948 amendment to § 2254. Accord, *Darr v. Burford*, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950).

The language of the amendments likewise implies immediate application. Recall that § 2254(d) does not empower a court to issue the writ. Instead it *forbids* issuance of the writ – the application "shall not be granted unless" certain conditions have been met. The prohibition is prospective: a court must not issue the writ tomorrow, unless. . . . The difference between an authorization and a prohibition is one we must respect. See *Ivey v. Harney*, 47 F.3d 181 (7th Cir.1995). It is the sort of difference that the Supreme Court has relied on when holding that changes in the law affecting judicial ability to supply prospective relief govern pending cases. E.g., *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201-02, 24 L.Ed.2d 214 (1969); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201-02, 42 S.Ct. 72, 75-76, 66 L.Ed. 189 (1921); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464, 41 S.Ct. 172, 175, 65 L.Ed. 349 (1921), all discussed favorably in *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1501. Current law normally governs when statutes "speak to the power of the court rather than to the rights or obligations of the parties," *Republic National Bank of Miami v. United States*, 506 U.S. 80, 99-100, 113 S.Ct. 554, 565, 121 L.Ed.2d 474 (1992) (Thomas, J., concurring) (quoted with approval in *Landgraf*, 511 U.S. at ___, ___, 114 S.Ct. at 1499, 1502). We do not suggest that § 2254(d) reduces the power of the court in the sense of subject-matter jurisdiction, which survives intact in 28 U.S.C. § 2241; a state may waive the benefits of § 2254(d),

although other provisions of the 1996 Act, such as the revised exhaustion requirement in § 2254(b), suggest that counsel's inattention to the niceties of federal practice does not forfeit the benefits the law bestows on the state as an entity. See also *Eaglin v. Welborn*, 57 F.3d 496, 498-99 (7th Cir.1995) (en banc) (holding that a court may decide a case on the basis of *Teague* even if the state's lawyers overlooked that possibility). Our point, rather, is that the amended § 2254(d) is designed to curtail collateral review and augment the finality of judgments, which strongly implies application to existing judgments.

C

Lindh and the State of Wisconsin litigated in the state's forums the constitutional claim he presents to us. To leave the ensuing judgment in force – and to leave all of the rules governing primary conduct intact – is not "retroactive" in the sense *Landgraf* uses that term, and the amended § 2254(d) is therefore presumptively applicable. We respectfully disagree with the contrary conclusions of *Edens v. Hannigan*, 87 F.3d 1109, 1111 n. 1 (10th Cir.1996), and *Boria v. Keane*, 90 F.3d 36 (2d Cir.1996).

There remains a possibility that application of the 1996 Act could "attach new legal consequences" to events *other* than the crime and the state's legal processes and judgment. Consider, for example, how the filing deadline in § 101 of the 1996 Act applies to existing judgments. Under the new statute, 28 U.S.C. § 2244(d), a petitioner has only one year from the completion of direct review to commence a collateral attack; there was no corresponding

limit in prior law, although Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts established an amorphous standard linked to prejudice to the state. A prisoner could wait a decade without transgressing Rule 9(a). See *Lonchar v. Thomas*, ___ U.S. ___, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996). Lindh got his collateral attack under way less than a year after the Supreme Court of Wisconsin decided his case. But suppose he had waited two years, filing in 1993 rather than 1992. Would we now apply § 2244(d) and dismiss the petition? Not at all. A prisoner's decision to defer filing – perhaps while doing legal research, or while waiting for the Supreme Court to decide a case that could influence the selection of issues – is the sort of event to which the amended statute would "attach new legal consequences." Courts treat a reduction in the statute of limitations as a rule for new cases only. See *Landgraf*, 511 U.S. at ___ n. 29, 114 S.Ct. at 1502 n. 29. And although no decision of the Supreme Court addresses the question directly, we do not doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway. A new statute is unlike a judicial construction of an existing statute, which after *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), governs all pending cases. Section 2244(d) is short enough that the "reasonable time" after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed

under § 2244(d) and the parallel provision added to 28 U.S.C. § 2255 by § 105 of the 1996 Act.

But Lindh lacks any reliance interest nearly that strong. His able counsel identifies only two steps he took (rather, omitted) in supposed reliance on the prior state of the law: he did not ask the Supreme Court of the United States to review the decision of the Supreme Court of Wisconsin, and he did not file a collateral attack in state court. Let us start with the omission of a petition for certiorari. Lindh observes that the Supreme Court, engaged in direct review under 28 U.S.C. § 1257, would not have been (and still is not) affected by § 2254(d). That is true enough, but even under the former text of § 2254 petitioners faced obstacles (such as the exhaustion requirement, the special protection of state courts' findings of fact, and the *Teague* doctrine) that did not apply on direct review under § 1257. A court exercising appellate jurisdiction has now, and had in 1991, more authority to correct errors than a court hearing a collateral attack. Defendants in state cases bypass their opportunity to seek certiorari not because they expect favorable treatment under § 2254, but because they recognize that the Supreme Court of the United States rarely grants such requests. "A petition for a writ of certiorari will be granted only for compelling reasons." S.Ct. R. 10. As a practical matter, to obtain direct review Lindh would have had to establish not only the national importance of the question at hand, but also that the decision of the Supreme Court of Wisconsin interpreted the Constitution in a way disagreeing with the interpretation of the highest court of another state, or of a United States court of appeals. S.Ct. R. 10(b). Lindh does not argue that his case

presents such an abstract legal question; instead he argues that the state's courts misapplied settled law to the facts of his case. Such a contention had no prospect in 1991 of receiving an audience in the Supreme Court of the United States, and Lindh gave up nothing of value by deciding not to seek certiorari. Lightning can strike a petition for certiorari, but Lindh's would not have been a good lightning rod.

As for the omission of a collateral attack in state court: Wisconsin would not have entertained one, had Lindh filed it. Wisconsin does not permit an inferior court to review a decision of the state's highest court. Wis. Stat. § 974.06. A prisoner who can establish an unusual reason, such as an intervening change of law, may wage a collateral attack in Wisconsin even after the state's Supreme Court has addressed the merits, see *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), but Lindh does not qualify for this exception – and, if he does, the state courts remain open to him. Lindh contends that the Supreme Court of Wisconsin misunderstood one factual question: whether Roberts' privileges at the University of Wisconsin Hospital had been suspended by the time of trial. The court wrote that the record did not show such a suspension, 468 N.W.2d at 173, and Lindh says that this is wrong. If so, and if this is important, Lindh could have sought rehearing in the state court or could have introduced factual support for his position in the federal district court. He did neither, raising this contention for the first time only in supplemental briefs filed after the case had been set for rehearing en banc. Issues raised so belatedly are forfeited; we deny the motion to supplement the record. Lindh's delay cannot be attributed to the

1996 Act, as he had ample opportunity to make his version of events known under both former and current § 2254 (the amended § 2254(e)(1), 110 Stat. 1219, authorizes a petitioner to dispute a factual determination by a state court, although proof of error requires clear and convincing evidence). Once again, therefore, Lindh's litigating decisions were not affected by the difference between the versions of § 2254. The 1996 Act does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1505. The new law therefore governs our consideration of Lindh's contentions.

D

Almost as an afterthought, Lindh (with the support of the American Bar Association, as *amicus curiae*) asserts that *any* alteration in the scope of collateral review after a prisoner has filed a petition under § 2254 violates Art. I, § 9, cl. 2 of the Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Lindh does not cite any authority for this proposition, and we think the contention feckless. If the new § 2254(d) "suspends" the Great Writ, it does so no less for cases filed on April 25, 1996, than for cases pending on April 24. Yet to alter the standards on which writs issue is not to "suspend" the privilege of the writ. *Felker* so holds for another amendment made by the 1996 Act.

The writ known in 1789 was the pre-trial contest to the executive's power to hold a person captive, the device that prevents arbitrary detention without trial. *Ex parte Bollman & Swartwout*, 8 U.S. (4 Cranch) 75, 2 L.Ed. 554 (1807); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 18 L.Ed. 816 (1868); *Ex parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886). See *McCleskey v. Zant*, 499 U.S. 467, 478, 111 S.Ct. 1454, 1461-62, 113 L.Ed.2d 517 (1991); *Schlup v. Delo*, ___ U.S. ___, ___, 115 S.Ct. 851, 862, 130 L.Ed.2d 808 (1995). The power thus enshrined did not include the ability to reexamine judgments rendered by courts possessing jurisdiction. *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 5 L.Ed. 391 (1822); see also Dallin H. Oaks, *Habeas Corpus in the States – 1776-1865*, 32 U. Chi. L.Rev. 243, 244-45 (1965). Under the original practice, "a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal . . . [and] prevented issuance of a writ". *United States v. Hayman*, 342 U.S. 205, 211, 72 S.Ct. 263, 268, 96 L.Ed. 232 (1952); see also *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 101, 19 L.Ed. 332 (1869).

The founding-era historical evidence suggests a prevailing view that state courts were adequate fora for protecting federal rights. See Max Farrand, 1 *Records of the Federal Convention of 1787* 124-25 (1937). Based on this assumption, there was (and is) no constitutionally enshrined right to mount a collateral attack on a state court's judgment in the inferior Article III courts and, *a fortiori*, no mandate that state court judgments embracing questionable (or even erroneous) interpretations of the federal Constitution be reviewed by the inferior Article III courts.

Collateral review of judgments accordingly is subject to legislative control, as the first Congress, dominated by those who wrote and ratified the Constitution, recognized. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 7 L.Ed. 650 (1830). Section 14 of Judiciary Act of 1789 prohibited any inquiry by the federal courts into the propriety of state custody. 1 Stat. 82; see *Ex parte Dorr*, 44 U.S. (3 How.) 103, 11 L.Ed. 514 (1845). Congress first created a general power of collateral review in 1867, 14 Stat. 385, and then repealed it the next year, 15 Stat. 44, a step sustained in *McCardle*. (Limited powers created in 1833, 4 Stat. 634-35, to protect federal officers from state interference, and in 1842, 5 Stat. 53940, to protect foreign nationals, did not affect the bulk of criminal cases.) The general power was not reestablished until 1885, 23 Stat. 437, and has been subject to frequent revision by Congress – and reinterpretation by the Supreme Court – ever since. Collateral review of judgments entered after full opportunity for litigation is the work of the 20th Century. Whether the first occasion came in 1953 with *Brown v. Allen*, or that honor belongs instead to *Waley v. Johnston*, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942), or even *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915), which stretched the rule that a writ may issue when the convicting court lacks "jurisdiction" (see *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1874)), does not matter. Justices debated the question in *Wright v. West*, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), as a matter of statutory interpretation. "Judgments about the proper scope of the writ are 'normally for Congress to make.' " *Felker*, ___ U.S. at ___, 116 S.Ct. at 2340, quoting from *Lonchar*, ___ U.S. at ___, 116 S.Ct. at 1298. Any suggestion

that the Suspension Clause forbids every contraction of the powers bestowed by Congress in 1885, and expanded by the 1948 and 1966 amendments to § 2254, is untenable. The Suspension Clause is not a ratchet.

II

Section 2254(d)(1) provides that a writ may not issue unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". What does this mean? Is it congruent with the judicial role established by Article III of the Constitution? And how does it affect Lindh's contentions?

A

The Conference Report on the 1996 Act says that § 2254(d) "requires deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law." H.R.Conf.Rep. 104-518, 104th Cong., 2d Sess. 111 (1996). This passage, together with similar comments on the floor, has led to an unproductive debate among the parties ano the *amici* about what "deference" entails. It is a wonderful illustration why legislative history so often misleads – for the word "deference" does not appear in the statute. It does not tell us to "defer" to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron U.S.A. Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), depends on delegation. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). Congress did not delegate either interpretive or executive power to the state courts. They exercise powers under their domestic law, constrained by the Constitution of the United States. "Deference" to the jurisdictions bound by those constraints is not sensible. We see no need to pursue this subject, however, because our task is to construe the enacted statute, not to construe its legislative history.

The first phrase of § 2254(d)(1) – authorizing a federal court to issue the writ when the state court's decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States", preserves rather than undermines federal courts' independent interpretive power. Federal courts are free to express an independent opinion on all legal issues in the case. So if, for example, the Supreme Court of Wisconsin had held that the Confrontation Clause does not entitle defendants to cross-examine witnesses to establish bias, then *Davis v. Alaska* would show that the decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States", even if decent arguments could be constructed that *Davis* misunderstood the Confrontation Clause. Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law "as determined by the Supreme Court of the United States" that prevails.

This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty in this portion of § 2254(d)(1) is not the "contrary to" part but the reference to "Federal law, *as determined by the Supreme Court of the United States*" (emphasis added). This extends the principle of *Teague* by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ. It does not, however, purport to limit the federal courts' independent interpretive authority with respect to federal questions.

An application for a writ is only an invitation to a federal court to grant the requested relief upon its review of a criminal conviction and confinement under state law. See *Felker*, ___ U.S. at ___, 116 S.Ct. at 2339. The authority to issue the writ is conferred on courts by statute. *Ex parte Bollman & Swartwout, supra*. It is doctrinally distinct from the statutory grant of jurisdiction to decide a case or controversy, e.g., 28 U.S.C. § 1331. Yet just as Congress may restrict the jurisdiction of the inferior Article III courts, so it may prescribe limits on the granting of the extraordinary relief provided by the writ of habeas corpus.

A conflict between decisions of the Seventh Circuit and the Supreme Court of Wisconsin would not authorize issuance of a writ under § 2254(d)(1). State courts must knuckle under to decisions of the Supreme Court, but not of this court. So Lindh must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. He has *Davis* and *Van Arsdall*. We therefore

need not shoulder the potentially difficult task of determining when an appellate gloss on a decision of the Supreme Court has so far departed from its wellsprings as to be the "real" source of law, or when the chain of reasoning has stretched so long that the rule cannot be called "clearly established" as of the time the state court rendered its decision. These are the sorts of questions presented by the *Teague* standard, e.g., *Gray v. Netherland*, ___ U.S. ___, - ___ ___, 116 S.Ct. 2074, 2083-85, 135 L.Ed.2d 457 (1996); *Sawyer v. Smith*, 497 U.S. 227, 236, 110 S.Ct. 2822, 2828, 111 L.Ed.2d 193 (1990); *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990) ("compelled by existing precedent"), and the "clearly established" language is unlikely to pose a different kind of interpretive challenge.

The new § 2254(d)(1) adds a twist to the complexities of the *Teague* inquiry, however, because it explicitly identifies only the Supreme Court as the font of "clearly established" rules. This language could be understood to adopt an unfortunate view that applies the unitary model of the executive department to the judicial department as well. Such a view of the judiciary, which runs counter to the explicit textual differences between the vesting clauses of Articles II and III, assigns to the inferior Article III courts a role analogous to that of an executive agency. From this flawed perspective, the inferior courts are seen as agencies of the judicial department with authority derived from the power vested in the Supreme Court.

The Constitution vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III § 1. The vesting clause of Article III is quite different

from the vesting clause of Article II, which says that the "executive Power shall be vested in a President of the United States of America." Art. II § 1 cl. 1. By virtue of the grant in Article II to a single person, agencies of the executive department exercise executive authority on behalf of the President. See *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

In contrast, the judicial power is given by the Constitution to each of the inferior Article III courts. Accordingly, when these courts act within their jurisdictions, they exercise the judicial power directly, though subject to the limits of revisionary jurisdiction of a court superior within the Article III hierarchy. The inferior courts do not rely on the Supreme Court for their authority to exercise the judicial power, for this power is given them directly by Article III once they are ordained, established, and provided with jurisdiction by Congress.

Lindh would like us to stop here, to announce that § 2254(d) has not changed the law in any way material to his case, and to proceed to decision. We cannot do that, because one ingredient of Lindh's claim is not well established. The Confrontation Clause (and therefore the principles of *Davis* and *Van Arsdall*) governs at trial of the merits, but not at sentencing. Is the dispositional phase of a bifurcated trial closer to the merits, or to sentencing? We return to that question in Part II.C. Moreover, we do not read the "contrary to . . . " language to authorize issuance of a writ whenever a court errs, as Lindh and the *amici* prefer; that would vitiate the second ("unreasonable application") clause of § 2254(d)(1). The two clauses have separate functions. We must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated

by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts – when it is, in the standard phrase, a "mixed question of law and fact" – sec. 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application of" the law.

The reference to an "unreasonable application of Federal law" sounds like the official-immunity question in constitutional-tort litigation, but we doubt that this is quite the right analogy. Principles of immunity are designed to draw the line between prospective relief and damages from a governmental body, on the one hand, and payment from the pocket of a public employee, on the other. Section 2254(d)(1) serves an entirely different function. Perhaps, then, the unreasonable-application language should be understood as another variation on *Teague*. Recall the quotation in *Lockhart* from *Butler*: *Teague* "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Section 2254(d)(1) generalizes this principle of respect by withdrawing the "later decisions" proviso.

How much leeway does the "unreasonable application" language create? None on questions of interpretation. It does not authorize or permit state courts to deviate from the Constitution. Federal courts acting within their jurisdiction are always entitled to interpret the law independently. Section 2254(d)(1) as we read it does no more than regulate relief. It tells federal courts: Hands off, unless the judgment in place is based on an

error grave enough to be called "unreasonable." Historical practice (see Part I.D above) likewise counseled restraint in use of the writ. Other rules limiting the remedy abound. We have mentioned official immunity cases, in which federal courts retain full interpretive power, but forbear from using the remedy of damages. Consider, too, the doctrine of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), under which the exclusionary rule does not apply to evidence gathered in reasonable reliance on a search warrant, even if the warrant was issued in violation of the Constitution. In such cases the court retains (but need not exercise) the power to identify the state court's violation of the Fourth Amendment, see 468 U.S. at 925, 104 S.Ct. at 3422, but the remedy of suppression (and a new trial) is withheld unless the violation is obvious, or the officer's reliance unreasonable. The inevitable-discovery doctrine similarly specifies situations in which a constitutional violation (established by independent review in the federal courts) does not lead to the remedy of upsetting a criminal conviction. See *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

None of this answers the question when a departure is so great as to be "unreasonable," for that question lacks an abstract answer, just as courts have been unable to give precise content to phrases such as "abuse of discretion." Application of *Leon* therefore has required careful inquiry one case at a time, and we do not see how application of § 2254(d)(1) can be much different. For current purposes it is enough to say that when the constitutional question is a matter of degree, rather than of concrete entitlements, a "reasonable" decision by the

state court must be honored. By posing the question whether the state court's treatment was "unreasonable," § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.

Questions of degree – like questions about the proper use of "discretion" – lack answers to which the labels "right" and "wrong" may be attached. When the subject is painted in shades of grey, rather than in contrasting colors, a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment. Think of the Speedy Trial Clause of the Sixth Amendment, which after *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), does not prescribe a rule for "how long is too long" but rather establishes a list of factors to consider. The Supreme Court of the United States sets the bounds of what is "reasonable"; a state decision within those limits must be respected – not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions. That is the principal change effected by § 2254(d)(1).

B

The American Bar Association and a group of former federal judges, appearing as *amici curiae*, contend that § 2254(d)(1) is unconstitutional to the extent it requires anything less than plenary review of all contentions based on federal law. Their argument, distinct from Lindh's invocation of the Suspension Clause, is that the

"judicial Power of the United States" (Art. III § 1) is the power to interpret the law independently. They rely on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is") and modern statements such as *Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, ___, 115 S.Ct. 1447, 1453, 131 L.Ed.2d 328 (1995), and *Gutierrez de Martinez v. Lamagno*, ___ U.S. ___, ___, 115 S.Ct. 2227, 2234, 132 L.Ed.2d 375 (1995).

If by this line of argument the *amici* mean that federal courts must give judgment without regard to the legal views of other public actors, and without regard to the resolution of contested issues in state litigation, then their argument reaches far beyond § 2254(d). It would mean that deference in administrative law under *Chevron* is unconstitutional; that the respect accorded to Congress when it speaks on constitutional questions (e.g., *Wisconsin v. New York City*, ___ U.S. ___, ___-___, 116 S.Ct. 1091, 1100-01, 134 L.Ed.2d 167 (1996); *Weiss v. United States*, 510 U.S. 163, 177, 114 S.Ct. 752, 760-61, 127 L.Ed.2d 1 (1994); *Donovan v. Dewey*, 452 U.S. 594, 603, 101 S.Ct. 2534, 2540, 69 L.Ed.2d 262 (1981); *United States v. Watson*, 423 U.S. 411, 416, 96 S.Ct. 820, 824, 46 L.Ed.2d 598 (1976)), must be abandoned; and that the Full Faith and Credit Clause (Art. IV § 1) conflicts with Article III. This position would demolish numerous doctrines in the law of collateral attack that no one (until now) has supposed pose constitutional difficulties.

Consider *Stone v. Powell*, 428 U.S. 465, 482, 96 S.Ct. 3037, 3046, 49 L.Ed.2d 1067 (1976), which holds that when a "State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution

does not require that a state prisoner be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at the trial." *Stone* contemplates – indeed it requires – that a federal court refrain from issuing a writ under § 2254 even though the court is convinced that the state judges erred on the law, and even though the error altered the outcome of the case. On several occasions the Supreme Court has treated *Stone* as a doctrine that on grounds of prudence could be extended to other subjects (although the Court has not so extended it). See *Reed v. Farley*, 512 U.S. 339, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) (claims under the Interstate Agreement on Detainers); *Withrow v. Williams*, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (claims based on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). If the Court could adopt *Stone* and consider extending its scope, creating a gap between the "merits" and the obligation to issue a writ, then Congress may do the same by amending § 2254.

Teague likewise establishes a disjunction between the meaning of the Constitution and the use of habeas corpus. If a state judgment becomes final in 1992, and the Supreme Court articulates a new rule of constitutional law in 1993, then a petition for collateral review in 1994 will fail – not because the state court was "right" on the merits, but because some errors of constitutional law do not support collateral relief. Section 2254(d)(1) codifies and extends the principle of *Teague*, and if *Teague* is consistent with Article III, then so is § 2254(d)(1) as we have construed it.

The *amici curiae* neglect a basic distinction that *Plaut* recognizes: Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases. See ___ U.S. at – ___ ___, 115 S.Ct. at 1452-53; see also *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441, 112 S.Ct. 1407, 1414-15, 118 L.Ed.2d 73 (1992). Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck, but it may prescribe maximum damages for categories of cases, *Carter v. United States*, 982 F.2d 1141 (7th Cir.1992), or provide that victims of torts by federal employees cannot receive punitive damages, see 28 U.S.C. § 2674. It may establish that if the driver was acting within the scope of his employment, the United States must be substituted as a party and the driver dismissed – even if that turns out to deprive the victim of compensation. See *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). Even for claims based on the Constitution, there may be rights without remedies. *FDIC v. Meyer*, 510 U.S. 471, 484-86, 114 S.Ct. 996, 1005-06, 127 L.Ed.2d 308 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983); *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). So too with § 2254(d)(1). Congress lacks power to revise the meaning of the Constitution or to require federal judges to "defer" to the interpretations reached by state courts. Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired. Regulating relief is a far cry from limiting the interpretive power of

the courts, however, and Congress has ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed.

This distinction between rights and remedies is fundamental. Every day, courts decline to disturb judgments that they *know* are wrong. This is the principal function of the law of judgments. Suppose *A* and *B* are plaintiffs in the same lawsuit, which they lose; *A* appeals and wins, while *B* does not appeal. It has now been established that the judgment against *B* is wrong. May *B* file a new suit to obtain the benefit of *A*'s victory? The answer is "no." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The Full Faith and Credit Clause is designed to make this result a matter of constitutional entitlement. And although today we think of claim preclusion (res judicata) as a specialty of civil law, it is only in this century that courts have treated civil and criminal judgments differently. Recall the discussion in Part I.D above. See also *Felker*, ___ U.S. at ___, 116 S.Ct. at 2340; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 465-99 (1963) (tracing the history).

In suits under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), courts frequently rule for the defendant even though the plaintiff may be right on the merits. Public employees receive the benefit of the doubt on legal questions and must pay damages only when the legal right has been sufficiently well established and particularized that a reasonable official would have understood that what he is doing violates that right. See *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97

L.Ed.2d 523 (1987); *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir.1990) (en banc). Section 2254(d)(1) creates a related approach and is no less consistent with Article III. Even in criminal cases, courts sometimes enforce decisions they would not have made in the first instance. *Stone, Teague, Leon, Nix,* and the harmless-error cases, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), are among many illustrations of the gap between having a good legal argument and winning release from custody. *X* and *Y* are indicted for a joint crime. *X* pleads guilty; *Y* pleads double jeopardy and wins, whereupon *X* claims that his sentence is illegal and asks for relief. *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), holds that *X* must serve his sentence, because the plea of guilty waives even arguments that in retrospect are known to be correct.

Section 2254(d)(1)'s requirement that judges apply "Federal law, as determined by the Supreme Court of the United States", rather than their own understanding of the law, is consistent with the hierarchical nature of the federal judiciary. Judges of the inferior courts must implement the views of their superiors, from which it follows that many decisions of the lower courts will be inconsistent with the conclusions their judges would have reached, if unfettered by precedent. Applying, even predicting, the work of other judges, rather than reaching independent conclusions, makes up the bulk of the work of a federal judge – not only when interpreting the decisions of the Supreme Court, but also when deciding cases under the diversity jurisdiction, see *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and when

coping with federal law that is not uniform geographically, see *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126-27 (7th Cir.1993); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1544-48 (10th Cir.1996). See also *Lehman Brothers v. Schein*, 416 U.S. 386, 390-91, 94 S.Ct. 1741, 1743-44, 40 L.Ed.2d 215 (1974); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 17A *Federal Practice and Procedure* § 4248 (2d ed. 1988), discussing a circumstance under which a state court's decision is directly binding in federal litigation: the certification of a question of law to a state court. Article III does not establish a system under which judges of the inferior federal courts always must render judgment without regard to the conclusions of other courts.

Shortly before *Brown v. Allen* changed the rules, Learned Hand could write with confidence that

> upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights.

Schechtman v. Foster, 172 F.2d 339, 341 (2d Cir.1949). This expression of the longstanding distinction between unlawful *custody*, which supported a writ of habeas

corpus, and unlawful *procedure* in the course of a trial, which did not, reflected the law of the United States until 1953. Congress has elected to move back in that direction – but hardly very far, preserving independent federal review on pure questions of law, and subjecting mixed questions of law and fact to review for reasonableness. We would have to cast history to the winds to say that this decision, which respects fully-litigated judgments unless the state court has gone seriously wrong, transgresses constitutional limitations.

The American Bar Association's further argument (which Lindh joins) that the Due Process Clause of the Fifth Amendment protects § 2254 from amendment is unpersuasive. The ABA contends that because federal "courts traditionally have conducted a plenary review of [state] courts' ruling[s] on legal issues", the entitlement to such a review has become a "fundamental right" protected by the substantive component of due process analysis. To establish this "traditional" role, the ABA cites no case before *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935), a decision that is hardly pertinent. (*Norris* was not a collateral attack but arose on certiorari to a state court under what is now § 1257.) The summary of collateral review in Part I.D of this opinion, and Learned Hand's assessment of the state of the law in 1949, should disabuse any observer of the belief that plenary federal review of state criminal judgments is so firmly rooted in American tradition that any alteration has passed beyond legislative power. The Constitution contains an express limit on the power of Congress over the writ of habeas corpus – the Suspension Clause. It is not an appropriate exercise of the "judicial Power" to

supplement the Suspension Clause with a rule that enhancements of the 20th Century cannot be altered.

C

At last we reach Lindh's arguments about the restrictions the trial judge placed on his lawyer's cross-examination of Dr. Roberts. Lindh insists that he was entitled to cross-examine Roberts about the allegations of sexual misconduct in order to show, if not actual bias, a reason Roberts may have had to make his assessment more favorable to the prosecutor. Wisconsin replies with two arguments: first, that the decision is not "contrary to . . . clearly established Federal law" because the Supreme Court has never held that witnesses during the dispositional phase of bifurcated trials are subject to cross-examination; second, that if the Confrontation Clause applies, the decision to limit cross examination was not "an unreasonable application of" federal law, because under the Confrontation Clause "trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435.

Lindh rejoins that the first of these arguments is untenable because the Supreme Court of Wisconsin did not decide the case on that ground. Recall that the amended § 2254(d) begins by saying that a petition must not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings" unless

subsection (1) or (2) authorizes that step. Because the Supreme Court of Wisconsin addressed only the propriety of restricting the scope of cross-examination, it did not adjudicate on the merits the state's "claim" about the scope of the confrontation right. Lindh has this backwards. *Wisconsin* is not making any "claim" based on the Confrontation Clause. It is defending against Lindh's claim that the Confrontation Clause entitled him to cross-examine Roberts about the criminal investigation of the sexual-misconduct allegations. To prevail on this contention, Lindh must establish two propositions: that the Confrontation Clause applies at the dispositional phase of a bifurcated trial, and that the limitations on cross-examination were excessive. The Supreme Court of Wisconsin resolved this claim adversely to Lindh on the merits, by deciding the second proposition against him. Nothing in § 2254(d) calls on state courts to fill their opinions with discussions that by their lights are unnecessary, as the price of avoiding de novo review in federal court. There is a fundamental difference in federal practice between a "claim" and a legal theory. A "claim" is a demand for relief from an identified injury, which may be supported (or defeated) by many different theories. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 807-10, 108 S.Ct. 2166, 2173-75, 100 L.Ed.2d 811 (1988); *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.2d 223 (7th Cir.1993). The injury here is the restriction of cross-examination; the relief, a new trial. That claim has been resolved on the merits.

Lindh's contrary position would have especially unfortunate consequences when state law leads a state

court to bypass a particular legal theory. Suppose Wisconsin decides as a matter of its domestic law to extend the right of cross-examination to sentencing. A defendant then contends that he is entitled to cross-examine a given witness to uncover bias; the state's highest court disagrees on the ground that the potential for bias is too remote to justify what might be a lengthy line of questioning. If the defendant then seeks a writ of habeas corpus, a state should be entitled to reply that there is no "clearly established Federal law" creating any right of cross-examination in non-capital sentencing – indeed, that it is clearly established that there is none, see *Williams v. Oklahoma*, 358 U.S. 576, 584, 79 S.Ct. 421, 426, 3 L.Ed.2d 516 (1959); *Williams v. New York*, 337 U.S. 241, 249-50, 69 S.Ct. 1079, 1084-85, 93 L.Ed. 1337 (1949); *United States v. Wise*, 976 F.2d 393, 397 (8th Cir.1992) (en banc) – and that the state court's decision therefore cannot be "contrary to . . . clearly established Federal law". By Lindh's argument this response is impermissible, which could transmute a rule of state law (the extension of cross-examination to sentencing) into a rule of constitutional law, at least for purposes of that case. Yet one well established rule, not altered by the amendments, is that "[a] federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984). See also, e.g., *Gilmore v. Taylor*, 508 U.S. 333, 342, 344, 113 S.Ct. 2112, 2117-18, 2119, 124 L.Ed.2d 306 (1993); *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991); *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 948, 71 L.Ed.2d 78 (1982). If the Confrontation Clause

does not apply to a particular proceeding, then a mistaken restriction on the scope of cross-examination is nothing but an error of state law (which is how Justice Abrahamson's dissenting opinion approached Lindh's arguments). We therefore conclude that Wisconsin is entitled to make both of its arguments, and we turn to the first.

Starting from the premise that the Confrontation Clause is inapplicable to sentencing, Wisconsin contends that the dispositional phase of a bifurcated trial is more like sentencing than it is like the trial of the merits. At the first phase of Lindh's trial, the jury determined that he deliberately killed two people and tried to kill a third; he pleaded guilty to two other crimes. Having established all elements of the crimes beyond a reasonable doubt, Wisconsin contends, it was entitled to treat everything that followed as a matter of what should be done with the criminal – whether to imprison him (and, if so, where and for how long) or whether to "treat" him. As the state sees things, the two *Williams* cases necessarily establish that a person who provides evidence relevant only to disposition is not a "witness against" the defendant for purposes of the Confrontation Clause ("[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

Like questions about sentencing, the consequences of an insanity finding may be removed from the jury's purview. *Shannon v. United States*, 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994). Because "lack of mental disease" is not an element of the crimes under state law,

Wisconsin was free to decide that question by a preponderance of the evidence and even to assign the burden of persuasion to the defendant. A decision that Lindh was insane at the time of the shootings would not entitle him to release; it would only change the place of his confinement. The due process clause distinguishes prisons from mental institutions, see *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), but the Court held in that case that a state could choose to hold a criminal in a mental institution using the procedures for civil rather than criminal trials. And although an insanity finding would permit Lindh to seek release if he could later establish his recovery, this is not dramatically different from the opportunity to seek release from an indeterminate penal sentence on showing "rehabilitation," a feature of the federal sentencing system until the last decade and of some state systems even today. So the state submits.

Lindh does not have a decision of the Supreme Court clearly establishing that this line of argument is mistaken. Neither does he contend that the historical practice in criminal prosecutions exposed psychiatric testimony to cross-examination for bias even if the state bifurcated its proceedings. Instead he invokes a different set of analogies. If Wisconsin had established a unitary system, in which insanity was a defense on the merits (or in which sanity was an element of the offense), then Roberts plainly would have been a "witness against" him; and if a psychiatrist would have been a witness against the defendant in a unitary trial, how can bifurcation change things?, Lindh wonders. Perhaps one could respond that a chemist testifying at trial that a certain white powder is

cocaine is a witness against the defendant, but the same chemist testifying at sentencing about the same subject (to determine the quantity of the drug) is not; the contradiction is built into the Supreme Court's current jurisprudence.

Not prepared to concede that point, Lindh contends that *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), establishes that psychiatrists are "witnesses against" defendants even at sentencing. If that is correct, then *Specht* would "clearly establish" the lesser included proposition that defendants are entitled to cross-examine psychiatrists at the dispositional phase of a bifurcated trial. *Specht* actually stands for a different point, however: that if a state separates issues in such a way that the main trial does not establish all elements essential to imposition of the maximum punishment to which the defendant is exposed, the protections of the Confrontation Clause (and many other provisions) extend to ensuing proceedings, whether or not they are called "sentencing." Compare *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), with *Schiro v. Farley*, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994), and *Gray v. Netherland*, *supra*. Specht was convicted of "indecent liberties," a crime that in Colorado carried a 10-year maximum sentence. But he was sentenced under that state's Sex Offenders Act, which allowed the judge to impose an indeterminate term of one day to life on finding that the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." The Court held in *Specht* that psychiatric testimony bearing on these

issues was subject to cross-examination because it increased the maximum punishment beyond that set by law for the crime of conviction. As a practical matter, Colorado had made it a crime, punishable by life in prison, to be a mentally ill habitual sex offender. Wisconsin has not done anything of the kind. Murder is punishable by life in prison; the elements proved beyond a reasonable doubt at the first phase of Lindh's trial therefore authorize the punishment imposed on him. The dispositional phase offered Lindh the opportunity for mitigation, quite unlike proceedings under the Sex Offenders Act in Colorado.

It may well be that, when the Supreme Court finally considers the question at issue here, it will decide that all testimony bearing on the defendant's mental state, and its effect on his punishment, comes from a "witness against" the accused, and therefore must be subject to cross-examination, no matter how the state structures the trial and sentencing process. But it has not yet so held, and such a conclusion would be a nontrivial extension of current law. We think it impossible to say that "clearly established Federal law, as determined by the Supreme Court of the United States", entitled Lindh to cross-examine Roberts about the allegations of sexual misconduct with patients.

Lindh therefore has to demonstrate that the state court's decision "involved an unreasonable application of, clearly established Federal law". *Davis* and *Van Arsdall*, which demonstrate that the Confrontation Clause entitles defendants to cross-examine adverse witnesses to expose their bias to the jury, are equally clear that the proper scope of cross-examination is a matter of degree.

We quoted the pertinent language of *Van Arsdall* above. The Supreme Court of Wisconsin asked the *legally* correct question by inquiring whether the trial judge abused his discretion; this is exactly how *Van Arsdall* poses the issue. And the fact-specific answer cannot be called "unreasonable" even if it is wrong (as some members of this court who join this opinion believe). Roberts knew that prosecutors were investigating allegations made against him, but, by the time he filed his final report and testified, he also knew that the Dane County prosecutor was not in charge. He may have thought that the Milwaukee County prosecutor would reward aid to the Dane County prosecutor – but if Roberts thought that, he probably also believed that his many prior engagements as a prosecutorial expert would carry even more weight. Hindsight implies as much. The special prosecutor filed misdemeanor charges, to which Roberts pleaded guilty in January 1989. He was sentenced to probation without time in prison, and he agreed to surrender his medical license. The special prosecutor informed the sentencing judge of Roberts' many appearances as an expert witness over the course of his long career; Lindh's case was not singled out.

Nothing in the record shows that Roberts altered his views between his initial interview with Lindh (before any allegations of misconduct had come to light) and his testimony at trial. The possibility that Roberts altered his views – telling the prosecutors one thing orally at the outset of the case but offering another view, less favorable to Lindh, in the written report and on the stand –

was open to unfettered cross-examination. Lindh's counsel did not need to mention the sexual misconduct allegations to explore this question in depth. Under these circumstances, a reasonable and responsible judge might conclude that cross-examination based on the allegations that Roberts had sexual relations with three female patients would divert attention from the principal issue at hand – whether Lindh had a mental disease in January 1988 – without producing concrete evidence of bias. When a district judge comes to such a conclusion, a federal court of appeals will exercise deferential review, see *United States v. Hernandez*, 84 F.3d 931, 933-34 (7th Cir.1996), and will accord greater weight to thoughtfully reasoned decisions. Cf. *United States v. Beasley*, 809 F.2d 1273, 1278-79 (7th Cir.1987). *Hernandez* draws, for federal practice, a line similar to that of § 2254(d)(1): De novo appellate review for core legal issues, such as whether the Confrontation Clause applies, and deferential review for operational decisions within areas in which the constitutional norm allows discretion. Section 2254(d)(1) requires a federal court hearing a collateral attack to accord at least that much respect to the state courts.

The opinion of the Supreme Court of Wisconsin in Lindh's case is careful; it correctly states the holdings of *Davis* and *Van Arsdall*; it does not transgress any clearly established principles; instead it addresses a matter of degree about which thoughtful people can, and do, differ. Several portions of the opinion suggest that as a matter of state law the court was holding the trial judge to an even higher standard, which it thought satisfied. Lindh believes that the state court put too much weight on

objective factors (such as whether the Dane County prosecutor could reward favorable testimony) and not enough on subjective ones (such as the possibility that Roberts credited the Dane County prosecutor with more influence than he possessed, or was willing to exercise). By restricting in the new § 2254(d)(1) the scope of the extraordinary relief provided by the writ of habeas corpus, Congress has instructed the inferior federal courts to refrain from this sort of fine tuning. We hold accordingly that Lindh is not entitled to a writ of habeas corpus.

AFFIRMED.

DIANE P. WOOD, Circuit Judge, concurring in part and dissenting in part, with whom RIPPLE and ROVNER, Circuit Judges, join Part II.

This case underscores both the importance and the difficulty of the task with which courts are charged under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214, in applying the new substantive standards for the issuance of writs of habeas corpus in proceedings brought by state prisoners under 28 U.S.C. § 2254. Although I concur with most of the majority's analysis of the new law, I dissent from the way it has been applied here.

I

With one reservation, I concur in Part I of the majority's opinion, which holds that the amended version of § 2254 applies to Lindh's case. My reservation relates only to the ancillary decision to deny Lindh's motion to supplement the record in this court. See *ante*, at 867.

Lindh wanted to demonstrate that the record in the Wisconsin court reflected Dr. Leigh Roberts' suspension of privileges at the University of Wisconsin Hospitals by the time of the trial. This is not an effort to introduce new evidence in any sense of that term; it is only an effort to show us what was legitimately in the record before the Wisconsin courts. In my view, in light of the changes in the law that have occurred and the lack of prejudice to all concerned, we should grant that motion.

I am also in substantial agreement with Parts II.A and II.B of the majority's opinion, which hold that the amended version of § 2254(d)(1), construed properly, does not unconstitutionally trample on the Article III powers of the federal judiciary. In particular, I agree that nothing in the language of § 2254(d) requires the federal courts to "defer" to the legal determinations of the state courts, and therefore we need not confront the serious constitutional issues that would arise if the contrary were true. I begin to part company with the majority where it foreshadows its discussion in Part II.C of its opinion and suggests that we "need not shoulder the potentially difficult task of determining when an appellate gloss on a decision of the Supreme Court has so far departed from its wellsprings as to be the 'real' source of law. . . ." *Ante*, at 869. For better or for worse, that task will be ours in virtually every case that comes before us under the amended law, because it is rare indeed that we will see something identical in all particulars to a case already decided by the Supreme Court. However minor the factual variations, we both can and must look for guidance in our own decisions, decisions from other appellate

courts (federal and state), and persuasive secondary sources.

I also disagree with the majority's statement, *ante* at 870, that one ingredient of Lindh's claim is not well established. As I explain in more detail below, the majority's description of the Wisconsin scheme is incomplete, and is therefore potentially misleading. Whether the Wisconsin court labeled this phase "dispositional" in its opinion in *State v. Koput*, 142 Wis.2d 370, 418 N.W.2d 804 (1988), is not controlling as a matter of federal law. These are questions, however, that go to the application of amended § 2254(d), not to its compatibility with Article III.

Finally, in broad terms I agree with the majority's interpretation of the key components of § 2254(d)(1) and its explanation of the difference between something "contrary to" clearly established law and something that is an "unreasonable application of" such law. My concern is with a few statements that I fear could be misunderstood. For example, the majority states broadly that the "contrary to" language of § 2254(d) does not authorize issuance of a writ whenever a court errs. If all it means by that is that doctrines like harmless error continue to apply, then the statement is a harmless truism. If it were read to imply that prejudicial errors of law can be ignored, however, it would be wrong. The statute does authorize issuance of a writ, if the state court has committed a pure error of law. This is because the federal court has the power to decide whether the state court followed clearly established law as declared by the Supreme Court of the United States and because no deference is owed to

the state court's own views of that issue. The real problem is a familiar one (though no easier for being familiar): when is the issue purely one of law, and when is it a mixed question of law and fact. If the federal court concludes (*de novo*) that the state court has not made an error of law, then the question becomes whether there has been an unreasonable application of the law. This, I agree, is another way of describing the "mixed question of law and fact" situation. Unreasonableness makes sense as a standard here, if for no other reason than the deference that is owed to the state court's determination of the facts, see § 2254(e). The majority suggests that when the constitutional question is a matter of degree, rather than of concrete entitlements, the federal court must honor a "reasonable" decision by the state court. Most constitutional entitlements in the area of criminal procedure have elements of both: if a defendant's rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), have been violated with respect to part of the prosecutor's file, it is little comfort that the prosecutor turned over other *Brady* material; the same goes for Confrontation Clause rights of the sort we have here. Just because one can cross-examine a witness about prior inconsistent statements, for example, does not mean that cross-examination is unnecessary to show that the same witness had a plea bargain with the government. Many of these rights, in short, will not be matters of degree when we address them at the proper level of detail: the deprivation will be clear, and the federal court must decide whether the right was violated.

II

In order to explain why I disagree with the majority's resolution of Lindh's own case under the principles set forth in its opinion, it is necessary to supplement the statement of facts and the description of the procedures used in Wisconsin cases where a plea of not guilty by reason of mental disease or defect is entered.

Lindh went on his shooting rampage in the City-County Building in Madison, Wisconsin, on January 15, 1988. He himself was shot during the melee, was apprehended immediately, and was taken to the hospital under police custody. At 9:00 p.m. that evening, the district attorney's office contacted Dr. Roberts at his home and asked him to interview Lindh at the intensive care unit. Roberts agreed and promptly went to the hospital, arriving around 9:30 p.m. Lindh spoke with Roberts for some time, telling him about the circumstances preceding the murders and his feelings. Roberts elicited statements from Lindh indicating that he was not experiencing suicidal feelings, depression, hallucinations, or the like.

Lindh was arraigned in Dane County Circuit Court on February 26, 1988, and entered pleas of not guilty and not guilty by reason of mental disease. At that time, the court appointed Roberts and Dr. Frederick Fosdal, another forensic psychiatrist, to examine Lindh on behalf of the state. Shortly thereafter, Roberts learned that the University of Wisconsin Hospitals were investigating allegations that he had engaged in sexual misconduct with a female patient – allegations that he knew could lead to loss of his license and criminal penalties. In May

1988, the Medical Examining Board asked Roberts to provide it with records, revealing to Roberts that the Board, too, was concerned about these allegations.

In the meantime, Roberts continued to work on the Lindh case. On June 22, 1988, he interviewed Lindh again. The very next day, June 23, 1988, attorneys for the University of Wisconsin Hospitals referred the sexual misconduct allegations to the Dane County district attorney's office. Recognizing the potential for a conflict of interest, that office referred the case to a special prosecutor from the Milwaukee district attorney's office. Roberts learned of that appointment and of the criminal investigation on July 8, 1988. It was not until August 17, 1988, that Roberts first produced a written report on the case, which concluded that Lindh was not suffering from a mental disease or defect at the time of the shootings. On August 22, 1988, he interviewed Lindh a final time. Lindh alleges, as noted above, that the state trial court record shows that Roberts was suspended from the University Hospitals some time during the summer. Whatever the status of that allegation and his unsuccessful motion to supplement the record, it is clear that the state Medical Examining Board filed a civil complaint against him in August to take away his license, based on alleged sexual exploitation of three patients. Crucially, all these events transpired *before* the trial in Lindh's case.

On September 12, 1988, the state filed a motion *in limine* requesting that the trial court prohibit any cross-examination of Roberts concerning the allegations of misconduct pending against him or concerning any ramifications of those pending charges. Lindh opposed the motion, arguing that the circumstances raised serious

questions about Roberts' bias, motive, and interest. First, Roberts would present himself as a distinguished professional, and the jury might give less weight to his opinion if it knew that proceedings to revoke his license were pending. Second, defense counsel noted that University Hospitals had already suspended Roberts' privileges, which was important for the jury to know. Finally, Lindh argued that Roberts would have an incentive to please the prosecution, regardless of the technical fact that the particular prosecuting attorney was from Milwaukee rather than Madison. The case had received state-wide notoriety, and Roberts himself was a well-known expert witness. Unmoved by Lindh's arguments, the trial court granted the state's motion and found that evidence relating to the investigation of Roberts' misconduct was "totally irrelevant and immaterial."

When Roberts took the stand to offer his testimony, Lindh's worst fears were realized. During the initial presentation of his credentials, the jury learned that Roberts was a faculty member of the University of Wisconsin Medical School, that he was "on the adjunct faculty of the San Francisco Theological Seminary," that he had chaired conferences "in relation to religion and mental health," that about three years before he had been "honored . . . as essentially the mid-west psychiatrist of the year," and, on top of all that, that he was a loving grandfather with eight grandchildren "up to nearly the age of Mr. Lindh." Because of the trial court's ruling, the jury never learned that Roberts' affiliation with the University of Wisconsin was in peril, nor that he was about to lose the prestigious standing in the profession he had enjoyed up to that time. Worst of all, the jury never learned that Roberts might

have had a motive to favor the prosecution in his testimony.

As Wisconsin law requires in cases like Lindh's, there was a "continuous trial" in which the jury first considered the plea of not guilty, and, having concluded that Lindh was guilty, then considered his plea of not guilty by reason of mental disease or defect. See Wis. Stat. Ann. § 971.165(1)(a). The jury's one-sided picture of Roberts was particularly troubling because Roberts was the prosecution's star witness during the second (mental disease) stage of the proceedings. Emphasizing his superior ability to diagnose Lindh due to the contemporaneous interview he had conducted on the date of the shooting, Roberts testified that Lindh was not suffering from any psychosis at the time of the shootings and was fully capable of understanding the wrongfulness of his actions and conforming his behavior to the requirements of the law. The defense called Dr. Ezra Griffith, who testified that Lindh suffered from a mixed personality disorder and was in a brief reactive psychosis during the shootings. According to Griffith, Lindh was unable to appreciate the wrongfulness of his actions and conform his conduct to the law when he was in such a state. Finally, the other prosecution expert, Dr. Fosdal, offered an opinion somewhere in the middle: he agreed with Griffith that Lindh was suffering from a mixed personality disorder, but he disagreed that Lindh had experienced a brief reactive psychosis during the shootings. With this evidence before it, the jury found that Lindh was able to appreciate the wrongfulness of his conduct and to conform it to the law. See Wis. Stat. Ann. § 971.15(1). In

accordance with Wisconsin law, the judge therefore proceeded to the sentencing phase of the proceeding, see Wis. Stat. Ann. § 971.165(3)(a), and imposed a sentence of life in prison.

Wisconsin uses a three-phase proceeding in cases in which the mental responsibility of the defendant is at issue. A defendant is entitled to couple a plea of not guilty with a plea of not guilty by reason of mental disease or defect, pursuant to Wis. Stat. Ann. § 971.165(1). The statute establishes the order of proceedings for the two pleas as follows:

> (a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

Section 971.15(3), Wis. Stat. Ann., provides that "[m]ental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable degree of certainty by the greater weight of the credible evidence."

If the jury finds the defendant not guilty on the first plea, the court must enter a judgment of acquittal and discharge the defendant. § 971.165(1)(d). If, on the other hand, the jury finds the defendant guilty on the first plea, then the trial continues into phase two and the court withholds judgment pending the jury's determination on the second plea. *Id.* At the end of the second phase, the jury either finds that the defendant is not guilty by reason of mental disease or defect, or that the defendant is guilty (*i.e.* his affirmative defense fails). § 971.165(3). At that

point, the court either enters a judgment of "not guilty by reason of mental disease or defect," or it enters a judgment of conviction. *Id.* After the appropriate judgment is entered, the court concludes the proceedings with phase three, which is either a commitment hearing pursuant to § 971.17(2)(a) or a sentencing proceeding pursuant to §§ 972.13, 972.14, and 972.15. For those found not guilty by reason of mental disease or defect, the statute requires the court to commit the person to the department of health and social services for a specified period not exceeding two-thirds of the maximum term of imprisonment that could have been imposed, unless the maximum term of imprisonment is life, in which case the commitment period can also be life. § 971.17. As soon as six months after the person is committed, he is entitled to petition for conditional release. § 971.17(4)(a). He can continue filing these petitions once every six months. Importantly, the court "shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released." § 971.17(4)(e). A person who wins conditional release can then petition the court for termination of the order of commitment. § 971.17(5).

The Wisconsin Supreme Court discussed the predecessor statute to § 971.165 extensively in *State v. Koput*, supra, in which the principal issue was whether the jury verdict in phase two must be unanimous. It distinguished the responsibility phase of the bifurcated trial used in Wisconsin from the guilt/innocence phase, labeling it "a special proceeding in the criminal process in which the defendant has the burden of proof to establish his lack of

responsibility to a reasonable certainty by the greater weight of the credible evidence." 418 N.W.2d at 805. It rejected the public defender's arguments that the usual protections for a criminal trial, such as the need for a unanimous verdict by a jury of twelve, and the requirement of proof beyond a reasonable doubt, applied in the phase two proceeding. The affirmative defense tried during phase two related only to "responsibility," and had the effect of relieving the person of the sanctions for criminal conduct. The finding of guilt during phase one, however, is unaffected by phase two. For that reason, the Wisconsin Court concluded that phase two was "dispositional" in nature and that the jury rules for phase one were inapplicable. *Id.* at 812.

In its opinion in Lindh's case, the Wisconsin Supreme Court indicated that the Confrontation Clause of the Sixth Amendment, as well as its analog in Article I, section 7 of the Wisconsin Constitution, applies to the phase two proceeding. See *State v. Lindh*, 161 Wis.2d 324, 468 N.W.2d 168, 175 (1991). On one level, that is almost enough for us, because it tells us the significance Wisconsin attaches to this stage of the proceedings. But as an independent matter of federal law, the Wisconsin Supreme Court's conclusion is plainly correct. Clearly established law from the Supreme Court shows that nothing about the phase two proceeding would justify an exemption from the Confrontation Clause.

First, Wisconsin's practice of determining criminal responsibility in the second stage of a bifurcated trial, where the defendant has the burden of proof, is no different from many other state rules that the Supreme Court has approved that similarly shift the burden of proof. See,

e.g., Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (state may require accused to prove his insanity beyond a reasonable doubt); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (constitutional to require defendant to prove affirmative defense of extreme emotional disturbance in order to qualify for mitigating factor that reduced a charge to manslaughter); *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (constitutional to use "preponderance of the evidence" standard for the State's burden of proof at sentencing for minimum sentencing law); *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (constitutional for Ohio to require defendant to prove affirmative defense of self-defense by a preponderance, as long as instructions required prosecution to prove all elements of the offense of aggravated murder beyond a reasonable doubt). Thus, the Wisconsin Supreme Court was on firm ground in *Koput* when it found nothing objectionable about the use of a non-unanimous jury and a shift in the burden of proof for Wisconsin's criminal responsibility determination.

Second, no matter how for purposes of state law Wisconsin wishes to characterize phase two, it is clear that it is the definitive step that yields either a finding of criminal responsibility for the offense, and hence incarceration, or a finding of no criminal responsibility, and hence hospitalization for as little as six months or as much as a lifetime. The majority disregards the provisions of Wis. Stat. Ann. § 971.17 when it asserts, *ante* at 875, that the only consequence of a decision that Lindh was not criminally responsible would be to "change the place of his confinement." The majority dismisses the

possibility of release under § 971.17 as trivial, equating it to the chance of release under an indeterminate sentencing scheme. This position, however, overlooks both the critical features of the second phase of the Wisconsin proceeding and the defining characteristics of any sentencing proceeding.

It is undisputed that the second phase trial begins with a plea of "not guilty by reason of mental disease" and ends with a jury verdict of guilty or not guilty. Like all jury verdicts of guilty or not guilty, that is "dispositive" in the sense that it governs what kind of further proceedings will be required, but it is not "dispositive" in the same way a sentencing proceeding is. At the risk of stating the obvious, the purpose of a sentencing hearing is to pronounce the sentence, and the jury's phase two verdict does not even begin to address that subject. A sentence might be a fine or incarceration, or some combination of the two. It might include a period of probation or supervised release; construing the term broadly, it might even include commitment to a mental institution for a period of years. These issues are simply not before the court or the jury during the phase two trial in Wisconsin. Its sole purpose is instead to decide whether the person is criminally responsible, and hence will receive a criminal sentence, or if the person is not to be held responsible and instead is to receive involuntary commitment to a mental institution. (The latter, of course, occurs every day in contexts far removed from the criminal justice system.) The fact that the verdict of "guilty" from phase one stands does not distinguish this from many other situations – such as self-defense, heat of passion, or

justification – where it is clear that the defendant committed the criminal act, but he will not be punished for it. Furthermore, the analogy to parole or release under an indeterminate sentencing scheme does not hold up. No such system of which I am aware confers an *entitlement* on the defendant to win release unless the court finds by *clear and convincing evidence* that he must remain incarcerated. Yet this is exactly how the commitment rules in Wisconsin operate for individuals found not to be criminally responsible for their acts. See Wis. Stat. Ann. § 971.17(4)(d), (5).

The Supreme Court has always required application of the Confrontation Clause to proceedings that begin with a plea of not guilty and conclude with a finding of guilt or acquittal. *Cruz v. New York*, 481 U.S. 186, 190, 107 S.Ct. 1714, 1717, 95 L.Ed.2d 162 (1987) (for purposes of the Confrontation Clause, a witness against a defendant is anyone whose testimony "is part of the body of evidence that the jury may consider in assessing his guilt."); *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1067-68, 13 L.Ed.2d 923 (1965) (holding the right of confrontation applicable to the states under the Fourteenth Amendment). More than that, it has applied the Confrontation Clause to capital sentencing proceedings, where it is true that the only difference is in the nature of the sentence imposed (albeit an exceptionally important difference), explicitly recognizing the need for adversarial debate in such a context. See generally *Gardner v. Florida*, 430 U.S. 349, 360, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to

recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."). The plain fact here is that Lindh could, in the words of the Wisconsin Supreme Court, have been "relieve[d] . . . of the sanctions for criminal conduct" at the end of the phase two proceeding. See *Koput*, 418 N.W.2d at 812. It is no expansion of clearly established Supreme Court law to find here that stakes of this magnitude in the proceeding bring the Confrontation Clause into play, as the Wisconsin Supreme Court itself recognized.

Decisions of the Supreme Court of the United States also establish that Lindh's right to confront Roberts was impermissibly restricted, through the trial court's grant of the motion *in limine*. The two key cases, the majority agrees, are *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), and *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). In the 1974 *Davis* decision, the Supreme Court began with the observation that "[c]onfrontation means more than being allowed to confront the witness physically." 415 U.S. at 315, 94 S.Ct. at 1110. The main and essential purpose of confrontation is *"to secure for the opponent the opportunity of cross-examination." Id.* at 315-16, 94 S.Ct. at 1110 (emphasis in original). Cross-examination involves both the testing of the witness's story and impeachment or discrediting of the witness. As the *Davis* Court said, "[a] more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Id.* at 316, 94 S.Ct. at

1110. The Court held that counsel should have had the opportunity not only to ask the witness in question whether he was biased, but also to explore why he might have been biased or otherwise lacked impartiality.

The Court reiterated all these points in *Van Arsdall*. Notably for Lindh's case, it drew a distinction between trial court control of cross-examination to limit harassment, confusion, repetition, or the marginally relevant, and the prohibition of *all* inquiry into the possibility of a witness's bias. 475 U.S. at 679, 106 S.Ct. at 1435. It held that:

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." 475 U.S. at 680, 106 S.Ct. at 1436, quoting from *Davis v. Alaska*.

The particular risk of bias in *Van Arsdall* was quite similar to the type Lindh wished to put before the jury. The trial court in *Van Arsdall* prohibited inquiry into the terms of an agreement the witness had made with the prosecutor to drop a drunk driving charge in exchange for his testimony about the murder. There was nothing unusual or unprecedented in Lindh's effort to show that Roberts, too, might have been shading his testimony with the ulterior motive of securing better treatment from the state. Thus, Supreme Court decisions establish both that

the Confrontation Clause applies to the kind of proceeding we have here, and that the Confrontation Clause is violated when the defendant is precluded from exposing "possible biases, prejudices, or ulterior motives." *Davis*, 415 U.S. at 316, 94 S.Ct. at 1110.

The only question remaining is whether the Confrontation Clause was violated here, when the trial court precluded all inquiry into the proceedings at which Roberts risked loss of his professional license, obloquy from his peers, and criminal conviction. Both the Wisconsin Supreme Court and the majority here believe that the administrative transfer of the case from the Dane County prosecutor's office to the Milwaukee special prosecutor erased all possibility of concern from Roberts' mind. In my view, this asked the wrong question (*i.e.* was it sufficient when steps were taken to assure formal insulation of the Milwaukee prosecutor from the Dane County office), and thus produced the wrong answer. The focus must instead be on Roberts' motivations to shade his testimony, just as it was in *Van Arsdall*. It is worth recalling what had already happened to Roberts, before deciding whether the trial court erred in its total exclusion of the impeachment testimony. The two critical dates are July 8, 1988, and August 17, 1988. No later than July 8, 1988, Roberts knew that a criminal investigation of his activities was underway, with all that implied for his career. Yet it was not until August 17, 1988, as far as this record shows, that he first reduced his conclusions about Lindh to writing. The majority comments that there is no reason to believe Roberts changed his mind between the initial interview on the date of the shooting and August 17, but there is obviously no way to know if the trial

court forbade inquiry and cross-examination on the matter. (The majority suggests that Roberts was open to "unfettered cross-examination" on this issue, but that cannot be true given the fact that Lindh's counsel was forbidden to question Roberts on the one fact that might have led Roberts to change his mind: his legal problems, and his hope of winning favorable treatment from the prosecutors.) By the time the trial started, the state Medical Examining Board had also filed a civil complaint against Roberts to take away his license. Again, the jury knew nothing of this; instead, it was informed that he was "mid-west psychiatrist of the year."

Cross-examination on Roberts' legal difficulties was required for at least two reasons. First, when expert witnesses are proffered the jury is entitled to learn about their qualifications. See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Particularly in a field like psychiatry, where methodologies are not readily subject to the kind of objective scientific verification the Supreme Court called for in *Daubert*, the jury is entitled to evidence that will suggest what weight it should give to the expert's opinions. It is fanciful to assume that a jury would give the same weight to the "mid-west psychiatrist of the year" as it would give to someone who was facing both criminal charges and civil proceedings to revoke his license. Second, as Justice Abrahamson of the Wisconsin Supreme Court so ably demonstrated in her dissenting opinion, Roberts subjectively may have believed or hoped that a "good performance" on his part for the state might cause the prosecutor to treat him leniently. The fact that the prosecutor was called a "special prosecutor" for Dane County,

rather than a member of the usual staff, cannot have made any difference from Roberts' subjective viewpoint. The courts regularly see witnesses in criminal trials who face charges in multiple jurisdictions (federal and state, or several states or parts of states), and the witnesses are aware that their performance is being watched by all concerned. If a witness were testifying in a case before the Circuit Court of DuPage County, Illinois, and that witness were facing charges in Cook County, the State's Attorney would have no ground for keeping out cross-examination designed to show hope of favorable treatment at the hands of the Cook County authorities. Roberts' case is no different.

Indeed, the case is even stronger for finding that Roberts may have entertained such a hope. Not all criminal prosecutions – not even all murder prosecutions – receive state-wide publicity, but the Lindh case did. Roberts, who had testified by his own account all over the state, knew that he was known in Milwaukee, just as he was known in other parts of Wisconsin. He had every reason to begin his efforts for leniency on the witness stand in Lindh's case. (Although it is not relevant to the trial court's ruling on the motion *in limine* here, the record of the actual criminal sentencing that took place after Roberts was convicted on the charges shows that his expectations were well founded. Both the prosecutor and the judge expressed intense regret at having to sentence him to anything at all, given his outstanding service to the state over many years.)

Van Arsdall and *Davis* make clear that the trial court did not face an "all or nothing" option with respect to the proffered impeachment testimony. It was entitled to place

reasonable limits on it, to avoid having the jury distracted with Roberts' problems. The trial court could, for example, have permitted cross-examination about the existence of the pending charges and forbidden discussion of their basis, instructing the jury that the nature of the professional misconduct charges was not relevant. This, or other possible limitations, would have eliminated or minimized any risk of a salacious exploration of Roberts' sexual proclivities. The problem here, as in *Van Arsdall*, lay in the total exclusion of the evidence. It is impossible, given the absence of scientific validation of this kind of psychiatric diagnosis, to say that this error was harmless. The jury literally had to decide whose word it would accept: Roberts', Fosdal's, or Griffith's. We must recall that *only* Roberts testified both that Lindh had no personality disorder and that he was responsible at the time of the offense. The jury would have seen an entirely different picture if Roberts had been discredited, and it was left only with Fosdal, who agreed that Lindh had a personality disorder but who thought he was responsible at the time, and Griffith, who thought Lindh had the disorder and was not responsible for what he did. Lindh, recall, had only to persuade the jury by a preponderance of the evidence that he was suffering from a mental disease or defect and could not conform his actions to the law.

In my view, the adjudication of Lindh's claim in the Wisconsin courts resulted, in the words of § 2254(d)(1), in a decision that was contrary to clearly established federal law as determined by the Supreme Court of the United States. To the extent it might better be characterized as a mixed question of law and fact, the Wisconsin decision was an unreasonable application of clearly established

federal law. For the reasons I have explained, I would grant the writ of habeas corpus.

RIPPLE, Circuit Judge, with whom ROVNER, Circuit Judge, joins, dissenting.*

This case presents several issues involving the new amendments to section 2254 of the Judicial Code. Among those issues, the one of most enduring importance is whether the new section 2254(d) is compatible with the judicial role of the United States courts required by the Third Article of the Constitution. The problematic subsection, identified as such by the President in his approval of the legislation[1] and by legislators who favored and opposed the measure, forbids the issuance of a writ of habeas corpus unless the decision of the state court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

1.

Several rules of statutory construction are pertinent to our analysis. First, we must remember that the statute must be interpreted as a whole. The amended language therefore must be considered in relation to the unamended language. We must give every word of the statute a meaning. We cannot assume that Congress intended

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* Judge Ripple also joins Part II of Judge Wood's dissenting opinion.

[1] Statement of the President of the United States Upon Signing the Antiterrorism Bill, April 29, 1996, 1996 WL 203049 (White House).

certain words or phrases to have no force and effect. *See Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988). We also must attempt to interpret the statute in a manner that renders it constitutional. *See Johnson v. Robison*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 1165-66, 39 L.Ed.2d 389 (1974). In doing so, however, we must not give the statute a strained meaning that clearly was not the intent of Congress. *See, e.g., Seminole Tribe of Florida v. Florida*, ___ U.S. ___, ___ n. 9, 116 S.Ct. 1114, 1124 n. 9, 134 L.Ed.2d 252 (1996).

We turn briefly to another preliminary consideration. The text of the amended statute sets forth what can be characterized semantically as two separate requirements: (1) that the underlying state decision be contrary to or involve an unreasonable application of federal constitutional law; and (2) that the applicable federal constitutional law have been determined by the Supreme Court of the United States. Ease of presentation and discussion certainly suggests such a division and the majority adopts it as its analysis. In the paragraphs that follow, the same pattern will be followed as a preliminary matter. However, we must also remember that the structure of our analysis can, and indeed often does, predetermine the result. This two-pronged approach, helpful as it is in the presentation of the material, must be critically evaluated because, although it has the virtue of clarity, it may well not reveal the true operation and effect of the statute and therefore present a skewed model for final evaluation of the amendment's constitutionality.

Finally, it is important to note that, both before and after the amendment in question, the fundamental task of

the judiciary under this statute remains unchanged: Congress has given the federal courts, including this court, the task of determining whether a state prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254. Under the previous version of the statute, the federal court determined on its own the applicable federal constitutional standard. The new statute operates in a decidedly different manner. Having given the federal courts the jurisdiction to determine whether a person is being held in custody in violation of the Constitution and laws of the United States, Congress now has also mandated how the courts will determine the applicable constitutional standard.

2.

Under the new amendment, in ascertaining whether there has been a violation of the Constitution, the courts are restricted to the case law of the Supreme Court of the United States; they are not permitted to rely as well upon their own precedent. In short, Congress, although continuing to vest the federal courts with the authority to decide whether a person is being held in state custody in violation of the Constitution, has now specified that the judiciary is required to disregard the work product of one of its components, a source of law upon which the courts otherwise would rely in the adjudication of the case.

It is a "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected . . . as a permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S.Ct.

1401, 1410, 3 L.Ed.2d 5 (1958). As *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), made clear in the earliest days of the Republic, this obligation flows from the constitutionally imposed obligation of the courts to decide cases within their jurisdiction and to determine and apply the law necessary to adjudicate those cases.

In determining whether Congress has intruded impermissibly into the federal judicial function, we must, as the majority acknowledges, first determine, with specificity, the nature of the judicial power. There can be no disagreement with the basic proposition that the Constitution, in its very text, makes clear that, once created, the inferior federal courts share the judicial power with the "one Supreme Court" mentioned explicitly in the constitutional text. Nor can there be any disagreement that such power must be exercised in light of the "revisionary" jurisdiction of the Supreme Court. Beyond this point, however, it is difficult to determine the precise contours of the majority's concept of the federal judicial power. Despite its emphasis on the distinctive responsibility of an inferior court, it describes the role of that inferior court as simply placing a "gloss" on the work of the Supreme Court. If we are to understand the constitutional function that we are duty bound to protect, a far more carefully drawn description of its contours is indicated. It helps little to define it in the negative; it is obviously not the "agency relationship" that exists between the Chief Executive and the executive departments of the government.

The relationship and interreaction of the various levels of the judiciary in molding constitutional doctrine is the product of a carefully crafted balance of power

between the judiciary and the legislative branch. That balance of power is constitutionally based. Through its control of the appellate jurisdiction of the Supreme Court and the entire jurisdiction of the lower courts, Congress certainly can influence the development of the constitutional doctrine. However, just as there are limits on the constitutional authority of the judicial branch, so too there are limits on the power of Congress to dictate the process of decision-making within the judicial department with respect to the meaning of the Constitution. Although Congress has the authority to create and abolish the lower federal courts and to regulate their jurisdiction, it has no power to dictate how the content of the governing law will be determined within the judicial department. In the present jurisdictional structure ordained by Congress, it is the responsibility of the Supreme Court of the United States to regulate, principally through the doctrines of stare decisis and precedent, the jurisprudence of the lower federal courts. Control of the law making function of the lower federal courts, within the hierarchical nature of the judiciary, is therefore a matter within the province of the Supreme Court. The Supreme Court of the United States, with the authority to bring a court of appeals to doctrinal heal, determines the degree to which the lower courts ought to be permitted to engage in constitutional doctrinal development.

When a case comes before an inferior federal court in the normal course of its exercise of jurisdiction, it is the duty of that court to determine the constitutional question before it. The inferior courts have a clear responsibility to refine the basic constitutional principles

enunciated by the Supreme Court. The task is accomplished through the process of reasoned elaboration disciplined by the doctrines of stare decisis and precedent. The duty "to say what the law is" is a unitary one within the unitary judicial department created by the Constitution. *See Plaut v. Spendthrift Farm*, ___ U.S. ___, ___, 115 S.Ct. 1447, 1457, 131 L.Ed.2d 328 (1995) ("not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one Supreme Court' ") (emphasis in original). In performing that function, an inferior federal court is not free to determine the content of the Constitution without reference to the existing jurisprudence of the Supreme Court of the United States. It must decide the case, but it must decide it as it believes, after study of and reflection upon existing case law, the Supreme Court of the United States would decide it under the Constitution. *See Levine v. Heffernan*, 864 F.2d 457, 459 (7th Cir.1988), *cert. denied*, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989). The Supreme Court then determines, in due course, whether the doctrinal development will be short-lived or remain a long-term part of the fabric of the constitutional jurisprudence of the judicial department of government. One justice described the interrelationship of the work of the inferior and Supreme Court by explaining the Supreme Court's scrutiny of the work of the lower courts in these terms: "Across the screen each Term come the worries and concerns of the American people – high and low – presented in concrete, tangible form." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 175, 93 S.Ct. 408, 422, 34 L.Ed.2d 375 (1972) (Douglas, J., dissenting). The longevity of our constitutional jurisprudence is a matter that Congress can control only

through the initiation of the amendatory process or through the alteration of the jurisdictional scheme. Congress otherwise has no more right than we to determine those aspects of our jurisprudence that the Supreme Court will allow to endure.

In section 2254, Congress has given the district court the task of determining whether a person is being held in violation of the Constitution. To require the federal judiciary to hold that there is no constitutional violation simply because there is no case of the Supreme Court of the United States directly on point, is to deny it the right to refer to the corpus of jurisprudence to which it turns when it must "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *see also Wright v. West*, 505 U.S. 277, 305, 112 S.Ct. 2482, 2497, 120 L.Ed.2d 225 (1992) ("We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.") (O'Connor, J., concurring). The amended statute requires that we decide whether a person is in custody in violation of the Constitution without consulting the body of law that determines what the judicial department says the Constitution requires.[2]

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[2] The majority appears to sense the incongruity of its position when it seemingly acknowledges that such an intrusion into the federal judiciary's adjudicative function would not be permissible in the regular case or controversy but is acceptable in the case of habeas corpus. For the majority, a habeas corpus proceeding is somehow less of a constitutional case or controversy properly within the jurisdiction of the federal courts. Although this distinction is apparently crucial to its holding, the majority never discloses how or why the habeas jurisdiction of the federal courts somehow is different than other areas of the courts' jurisdiction. Although it is very clear

3.

Limiting the judicial function of determining the meaning of the Constitution to a scrutiny of the decisions of the Supreme Court is, in itself, a sufficient constitutional infirmity to vitiate the amended statute. An examination of the "second requirement," independent of the first, raises, however, substantial additional concerns about the amendment's effect on the constitutional integrity of the Third Branch.

The amended statute requires that, although the district court has the obligation under the statute to issue the writ when the person is held in violation of the federal Constitution, the court must accept as definitive an interpretation of the federal Constitution by the state court, if that interpretation is a reasonable view of the clear precedent of the Supreme Court. Assuming arguendo that a reference only to the clear precedent of the Supreme Court is constitutionally acceptable, even the decisions of the Supreme Court do not form the substantive rule of decision in granting or denying the writ unless the state court's decision is deemed unreasonable. Even if the Supreme Court's rendition of the Constitution is "clearly established," it becomes the rule of decision only if the state court's interpretation of the federal Constitution is deemed to be very different from that of the Supreme Court of the United States. Otherwise, the state's view of

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that the Congress, having once enacted a cause of action and vested a tribunal with the authority to adjudicate cases arising under it, can no longer dictate the rule of decision for the resolution of cases under it, we are told – as a matter of ipse dixit – that the situation is different with habeas.

the Constitution, not the Supreme Court's view, is operative.

Cast in its best light, this argument, at bottom, characterizes the restriction contained in the amendment as one of remedy: Congress simply has determined that the writ is to be available to state prisoners only when the state court's departure from the federal norm had been "unreasonable." Habeas relief is to be limited to those instances in which the degree of departure from the federal standard is so great as to have worked a gross deprivation of federal protection. This argument can be best evaluated by examining the support that the majority offers for this characterization. In its attempt to justify this approach, the majority points to other instances in which, despite the existence of a constitutional violation, plenary relief may not be available to an aggrieved individual. At first glance, these instances present seductive analogues to the present situation. Upon closer scrutiny, however, it is clear that in none of these instances is the federal court deprived of its essential responsibility and prerogative to define the meaning of the federal Constitution and to apply it to the case before it. Therefore these superficial comparisons provide no support for the statute under review in the present case.

There are several instances in which federal courts, although both declaring and applying the Constitution of the United States, place significant limitations on the available remedy. For example, in adjudicating a civil rights matter under section 1983, a federal court determines the applicable federal constitutional rule and applies it to the case before it. Its view, not the view of

any other sovereign, determines the applicable constitutional standard. Nevertheless, if a violation of a substantive constitutional standard is identified, the available remedy will vary depending on the circumstances.[3] So too, in our Fourth Amendment jurisprudence, the legality of the search always remains a matter of federal constitutional law, although the remedy of the exclusionary rule is inapplicable when the law enforcement officer reasonably relied upon a judicially issued search warrant. See *United States v. Leon*, 468 U.S. 897, 925, 104 S.Ct. 3405, 3422, 82 L.Ed.2d 677 (1984).

In the area of habeas corpus, the same pattern is evident. *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), simply holds that violations of the Fourth Amendment are not cognizable on habeas review because the violation does not affect the truth-finding process that is the principal focus of habeas relief. There is no deprivation of either the law declaring function or the adjudicatory function of the federal courts. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), likewise leaves intact the essential functions of the adjudicatory process. The case is adjudicated by the federal

[3] For instance, although a state official's conduct may be determined to have violated a prevailing constitutional standard, the official may be held to enjoy absolute immunity, *see Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (holding that a judge enjoys absolute immunity for judicial acts within his jurisdiction), or qualified immunity, *see Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 1095-96, 89 L.Ed.2d 271 (1986) (stating that qualified immunity for executive officials – state or federal – is the norm), from a damages remedy, although not from a prospective equitable remedy.

court on the basis of federal law. The rules of retroactive application of new developments are adjusted to take into account the nature of habeas relief.[4] It is not accurate, therefore, to term this amendment a mere extension of the principle of *Teague*. There is a qualitative difference – a constitutional difference – between fixing the time frame at which federal law will be applied and requiring that the federal court defer to any application of constitutional principle that cannot be characterized as unreasonable. Under the latter approach, mandated by the amended statute, the federal court must be content with a careful application of the Constitution, even if it is wrong. In essence, the federal court is free to have its own opinion of what federal law requires, but it must grant or deny the writ on the basis of another non-federal tribunal's view. Federal courts, however, must not merely expound on the cases before them; they must decide them. *Plaut*, ___ U.S. at ___, 115 S.Ct. at 1453. The judicial power is the authority, and the obligation, to adjudicate the case. Adjudication involves more than just the opportunity to declare the content and meaning of the law; it also involves the authority to apply that law as well.

4.

The magnitude of the deprivation worked on the judicial function can best be appreciated, however, by

[4] *Teague*, 489 U.S. at 309, 109 S.Ct. at 1074 (noting that in the habeas review context, "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system").

assessing the impact of the two phrases of the amendment together. Under the new scheme, the only permissible reference to federal constitutional law is to clearly established Supreme Court precedent. That precedent becomes the rule of decision with respect to the issuance of the writ only if the state court reaches an unreasonable view. When we pause to reflect on the role of the Supreme Court of the United States in constitutional adjudication and on the majority's view as to how reasonableness is to be measured, it becomes clear that any suggestion that a federal rule of decision will be applied to adjudications under section 2254 is illusory.

First, it must be remembered that it has never been the role of the Supreme Court of the United States to micro-manage the development of federal constitutional jurisprudence. From the days of the Great Chief Justice in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1818) – "[W]e must never forget that it is *a constitution* we are expounding" – to Congress' ratification of that role in the latest reassessment of the certiorari statute, see 28 U.S.C. § 1254 (1994), the Supreme Court's function has been to set, at a significantly broad level of generality, the guiding principles of our constitutional jurisprudence. Further application of those principles has been the work of the lower federal courts under the scrutiny of the Supreme Court.

In state criminal proceedings, these general principles must be applied, in the first instance, by the state courts. *See* U.S. Const. Art. VI. On habeas review, the majority holds that it is not simply a matter of the lower federal court's giving respectful heed to the interpretation of the federal constitution rendered by the state

court. Rather, the lower federal court must accept as the federal rule of decision the state court's view as preferable to its own. Moreover, given the broad level of generality at which the Supreme Court usually articulates the general principles of constitutional criminal procedure, the difference between the views of the federal and state court may indeed be substantial. Nevertheless, the majority tells us that these issues are "[q]uestions of degree" and that a reasonable decision of the state court must be honored. "Questions of degree" are subjects "painted in shades of grey, rather than in contrasting colors. . . . " This statement stands in stark contrast to the Supreme Court's own description of "contrasting colors" in *Estin v. Estin*, 334 U.S. 541, 545, 68 S.Ct. 1213, 1216, 92 L.Ed. 1561 (1948): "there are few areas of the law in black and white. The greys are dominant and even between them the shades are innumerable. For the eternal problem of the law is one of making accommodation between conflicting interests." The majority requires deference on all questions of degree. Yet, as the Supreme Court itself reminded us in *Estin*, discerning among the shades of grey is the essence of the adjudicatory function. *See Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985) ("But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination."). By suggesting that the amendment deprives the federal district court of responsibility for all questions of degree; the majority points graphically to why the amendment does not leave intact the integrity of the Third Branch: it deprives the

federal court not only of its prerogative to determine the content of federal law, but also of its right and duty to apply that law to the case before it.

As the Supreme Court has reaffirmed "time and again," the Constitution assigns to each of the three coordinate branches their own responsibilities and vests in each their own powers. *Morrison v. Olson*, 487 U.S. 654, 693, 108 S.Ct. 2597, 2620, 101 L.Ed.2d 569 (1988). And although the Supreme Court has rejected the formalist view that there is to be no "control or coercive influence,"[5] exerted by one branch over another, if one branch, through its actions, "unduly interfere[s]" with the role of another, such actions are void. *Morrison*, 487 U.S. at 693, 108 S.Ct. at 2620. In making this determination of "whether an Act [of Congress] disrupts the proper balance between the coordinate branches," we are to focus "on the extent to which it prevents . . . [another] Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443, 97 S.Ct. at 2790. The amended statute significantly "interfere[s]" with the judicial role and to a great extent prevents the judicial department from accomplishing its "constitutionally assigned functions." Simply put, the statute, as amended, deprives a federal court of the right to adjudicate the case. And a court that does not adjudicate advises: a role decidedly different than the one the Constitution envisions for courts and judges of the Third Article.

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[5] *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441-42, 97 S.Ct. 2777, 2789, 53 L.Ed.2d 867 (1977) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935)).

SUPREME COURT OF THE UNITED STATES

No. 96-6298

Aaron Lindh,

Petitioner

v.

James P. Murphy, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply.

January 10, 1997